A

DIGEST

OF THE

LAW OF EVIDENCE

IN

CRIMINAL CASES.

By HENRY ROSCOE, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET STREET.

1835.

CONTENTS.

GENERAL HEADS.

	Page
General Rules of Evidence.	
Primary and secondary evidence	1
Presumptions	12
Hearsay	20
Confessions	28
Examinations	43
Depositions	49
Proof of negative averments	55
Evidence confined to the issue	57
Substance of the issue to be proved	74
Witnesses	87
Documentary evidence	153
Aiders, accessories, &c.	166
Practice	174
Venue	185
Evidence in Particular Prosecutions.	
Abortion	190
Abduction	193
Affray	198
Arson	198
Assault	210
Bankrupt, concealing effects, &c.	220
Barratry	226
Bigamy	227
Bribery	243
Bridges	245
Burglary	252
Cattle	284
Challenge to fight	289
Cheating	290
Child-stealing	294
Child, concealing birth of,	294
Coining	296
Compounding offences	311
Conspiracy	312
Dead bodies	323
Deer	329

Page
Dwelling-house 330
Embezzlement 337
Escape 355
False personation 359
False pretences 361
Fish 371
Forestalling, &c. 373
Forcible entry and detainer 374
Forgery 380
Furious driving 441
Game 441
Gaming 447
Highways 449
Homicide 464
Kidnapping 465
Larceny 466
Libel 523
Maintenance 542
Malicious injuries 545
Manslaughter 566
Murder 562
Nuisance 658
Oaths, unlawful 666
Offices 669
Perjury 672
Piracy 692
Post-office 697
Prison-breach 705
Rape 708
Receiving stolen goods 712
Rescue 723
Riots, routs, and unlawful assemblies . . . 725
Robbery 732
Sacrilege 756
Shop-breaking, and entering a shop, and stealing therein 757
Smuggling and other offences connected with the customs 758
Sodomy 763
Spring-guns 764
Threats 765
Transportation, returning from 775
General Matters of Defence.
Infancy 777
Insanity 778
Coercion by husband 785

TABLE OF CASES.

Abbott v. Plumbe, 161.
Abgood's case, 774.
Abingdon's case, 539.
Abithol v. Beniditto, 81.
Abraham's case, 177, 420.
Abraham v. Bunn, 688.
Abrahat's case, 483.
Acerro v. Petroni, 126.
Adam v. Ker, 162.
Adams's case, 497, 651.
Adam v. Kelly, 531.
Adams v. Malkin, 222.
Adamthwaite v. Synge, 155.
Adey's case, 625.
Addis's case, 121, 637.
Admiralty case, 696.
Arckle's case, 10, 389, 492.
Airey's case, 365.
Akehurst's case, 112.
Akenhead's case, 655.
Alexander's case, 675.
Alexander v. Gibson, 136.
Alford's case, 674.
Alison's case, 160, 229.
Allanson's case, 461.
Allen's case, 7.
Allen v. Ormond, 450.
Almon's case, 533, 535, 536.
Amier's case, 332.
Amphlitt's case, 530.
Anderson's case, 558, 606.
Anderson v. Hamilton, 148, 149.
Andrews v. Cawthorne, 328.
Angus v. Smith, 141.
Annesley's case, 145.
Annesley v. Earl of Anglesea, 152
Anney v. Long, 88.
Anonymous, 17, 42, 55, 72, 79, 83, 86, 93, 94, 96, 113, 126, 155, 160, 161, 167, 180, 181, 188, 204, 211, 236, 238, 280, 281, 313, 317, 328, 475, 480, 507, 509, 526, 585, 619, 633, 652, 735, 738, 739, 786.
Antrobus's case, 250, 670.
Apoth. Company v. Bentley, 57.
Appleby's case, 15, 38, 40.
Appleton v. Lord Braybrooke, 156.
Archbishop of Tuam v. Robison, 536.
Archer's case, 719, 786.
Aris's case, 208.
Armstrong v. Jordan, 529.
Arnold's case, 779.
Arscott's case, 398.
Ashton's case, 730.
Aslett's case, 351, 508.
Athea's case, 277.
Atkins v. Hatton, 161.
Atkinson's case, 482, 651, 652, 785.
Atwell's case, 716.
Atwood's case, 120.
Att. Gen. v. Bowman, 72.
——— v. Bulpit, 124.
——— v. Davison, 59.
Audley's case, Lord, 708.
Austin's case, 451, 460, 506.
——— v. Poiner, 132.

Avison v. Kinnaird, 21.
Azire's case, 116.

Backler's case, 387.
Badcock's case, 102, 167.
Bagnall v. Underwood, 529.
Bailey's case, 260.
Baker's case, 419, 630, 739.
Bakewell's case, 351.
Baldwin's case, 715, 716.
Ball's case, 67, 201, 636, 667.
Balmore's case, 118.
Banbury Peerage case, 14, 56.
Banks's case, 6, 481, 491.
Barham's case, 444.
Barker's case, 340.
Barker v. Dixie, 113.
Barnett's case, 522.
Barnes's case, 222.
Barrett's case, 8.
Barron's case, 400.
Barrow v. Humphreys, 90.
Barstow's case, 40.
Bartlett's case, 555.
——— v. Pickersgill, 682, 688.
Barton's case, 423.
Bass's case, 482.
Basten v. Carew, 127.
——- v. Gooch, 673.
Batchelor v. Honeywood, 163.
Bate v. Kinsey, 10.
Bathews v. Galindo, 113.
Batt's case, 730.
Bayley v. Wylie, 159.
Bazeley's case, 344, 485.
Beacall's case, 402, 519.
Beamon v. Ellice, 124.
Beaumont v. Mountain, 154.
Beaney s case, 75, 78.
Beaven's case, 108, 379.
Bedder's case, 119.
Beech's case, 74, 679.
Beechey's case, 340.
Beeching v. Gower, 125.
Beere's case, 530, 538.
Beeley v. Wingfield, 311.
Bellamy's case, 154.
Bellingham's case, 781, 782.
Belstead's case, 517.
Belton v. Hodges, 221.
Bembridge's case, 291, 670.
Benesech's case, 681.
Bennet's case, 46, 258.
Bennett v. Clough, 14.
Bennett v. Watton, 87.
Benson's case, 158, 675, 684.
Bent v. Baker, 112.
Berkeley Peerage case, 22, 143.
Bernard's case, 671.
Berryman v. Wyse, 7, 8, 14, 528, 529.
Best's case, 314, 319.
Bevan v. Williams, 8.
Bignold's case, 681.
Bingham's case, 188.
——— v. Dickie, 81.
Bingley's case, 280, 408, 733.
Birch's case, 409.
Birkett's case, 121, 407, 415.
Birt v. Barlow, 160.
Bishops' case (seven), 150, 533, 539.
Bitton's case, 175.
Black's case, 40.
Blackham's case, 735.
Blackman's case, 109.
Blaney's case, 109.
Blaxton v. Pye, 448.
Blick's case, 500, 715.
Blower v. Hollis, 158.
Bloxam v. Elsie, 3.
Bodle's case, 53.
Boehlinck v. Schneider, 138.
Bolland's case, 386.
Bones v. Booth, 449.
Bonner's case, 25, 641.
Bontien's case, 391.
Booth's case, 670.
Bootyman's case, 348.
Borrett's case, 698.
Borthwick's case, 618.
Boston's case, 106, 409.
Botham v. Swingler, 125.
Boulter v. Clarke, 212.
Boulton's case, 520.
Bourke v. Warren, 536.
Bowes's case, 327.
Bowler's case, 781.

Bowman's case, 155.
Bowyer's case, 552, 553.
Box's case, 415.
Boyce's case, 653, 655.
Bradley v. Ricardo, 136.
Brady's case, 676.
Brain's case, 557, 566, 595.
Bramley's case, 514.
Bramwell v. Lucas, 151.
Brannan's case, 387.
Brazier's case, 21, 94, 480, 711.
Breemes's case, 200.
Brett v. Beeles, 23, 154.
Bretton v. Cope, 160.
Brewer's case, 397, 398.
Brewer v. Palmer, 2.
Brewster v. Sewell, 12.
Brice's case, 256, 260.
Briggs's case, 653.
Brisac's case, 327.
Broadfoot's case, 618.
Brocas v. Mayor of London, 160.
Brodribb's case, 667, 668.
Brogan's case, 49.
Bromwich's case, 54.
Brooks's case, 510.
Broughton's case, 688.
Brown's case, 116, 157, 195, 208, 255, 263, 266, 273, 360, 384, 400, 574. 597, 703, 744, 745.
Brown v. Croome, 540.
Bruce's case, 188, 736.
Brunton's case, 122.
Brunswick's case, 517.
Bull's case, 345, 485
Bullock's case, 85, 222.
Burbage's case, 89.
Burdett's case, 536, 538, 671.
Burgess's case, 271.
Burke's case, 132, 396.
Burley's case, 30, 35, 122.
Burnett's case, 665.
Burr v. Harper, 163.
Burridge's case, 172, 724.
Burrowes' case, 268, 278.
Burton's case, 343.
Bush's case, 81, 518, 714.
Bush v. Ralling, 108.
—— v. Steinman, 455.
Bushell v. Barret, 101, 314.
Butchell's case, 27, 37.
Butler's case, 233.
Butler v. Carver, 125.
Butteris's case, 718.
Butterworth's case, 282.
Buttery's case, 413.
Byam v. Booth, 159.
Bykersdike's case, 317.

Cabbage's case, 468.
Cadman's case, 650.
Caldwall's case, 576.
Call v. Dunning, 3, 161.
Callaghan's case, 27, 28, 51.
Callanan's case, 678.
Callan's case, 255.
Calthorpe v. Axtell, 197.
Calvert v. Archbishop of Canterbury, 23.
Camfield's case, 276.
Campbell's case, 333, 495, 528, 575.
——— v. Twemlow, 113.
Cannon's case, 743.
Capewell's case, 444.
Case's case, 299, 654.
Cass's case, 30.
Castell v. Bambridge, 593.
Castledine's case, 333.
Carlile's case, 525, 531, 540.
——— v. Eady, 126.
Carvey's case, 417.
Carr's case, 341, 657, 680.
Carroll's case, 270, 333, 655.
Carson's case, 77.
Carter's case, 101, 407.
Cartwright v. Green, 476.
Carty's case, 45.
Cary v. Pitt, 163, 164.
Cates v. Hardacre, 130.
—— v. Winter, 10.
Cator's case, 164.
Celier's case, 101.
Chadwick's case, 11, 368.
Chalder v. Robarts, 159.
Chalking's case, 263.

Chalkley's case, 78, 287.
Chamberlain's case, 56, 177.
Chambers v. Bernasconi, 23.
——— v. Robinson, 158.
Champneys v. Peek, 23.
Channell's case, 292.
Chapman v. Walton, 137.
Chapple's case, 287.
Chard's case, 506.
Charlewood's case, 481, 490.
Cherry's case, 470.
Child's case, 728.
——— v. Afflick, 540.
——— v. Grace, 39.
Chipchase's case, 482.
Chisholm's case, 415.
Christie's case, 26.
Christian v. Coombe, 140.
Chubb's case, 555.
——— v. Westley, 537.
Clancy's case, 100.
Clarke's case, 15, 21, 72, 79, 127, 283, 328, 476, 506, 512. 530, 567.
——— v. Clark, 146.
——— v. Periam, 664.
Claridge v. Hoare, 130, 314.
Clay's case, 286.
Clayburn's case, 263.
Clegg v. Levy, 239.
Clendon's case, 189.
Clewe's case, 32, 39, 42.
Clifford v. Brandon, 315, 726.
Clinch's case, 418.
Coalheaver's case, 166.
Coate's case, 789.
Cobbett's case, 526.
Cobden v. Rendrick, 145.
Cochrane's case, 134.
Codrington's case, 366.
Coe's case, 191.
Cohen's case, 673.
Coke's case, 655.
Cole's case, 58, 109, 296.
Coleman's case, 364.
Collet's case, 276.
Collicott's case, 395, 399.
Collier's case, 402.
Collins v. Blantern, 311.
Collins v. Carnegie, 528.
Collison's case, 658.
Comming's case, 291.
Compton's case, 316.
Coogan's case, 392.
Cook's case, 78, 133, 313, 632, 644.
Cooke v. Birt, 630.
——— v. Maxwell, 102, 148, 155.
——— v. Ward, 530.
Cooper's case, 33, 638.
——— v. Gibbons, 11.
Cope's case, 323.
Coppard's case, 685.
Corking v. Jarrard, 125.
Cornforth's case, 196.
Cornwall's case, 259, 295.
Corry's case, 671.
Corsen v. Dubois, 88.
Cosan's case, 759.
Coslett's case, 470.
Cotton's case, 22.
County's case, 523.
Courteen v. Touse, 126.
Cow's case, 18.
Cowell's case, 719.
Cowper's case, 565.
Cox's case, 219, 655, 656, 710.
Cozen's case, 710.
Cramp's case, 361.
Cranage's case, 86.
Craven's case, 27, 79, 506.
Crawley's case, 15.
Creevey's case, 539.
Crisp's case, 312.
——— v. Anderson, 11.
Crooke's case, 491.
——— v. Dowling, 157.
——— v. Edwards, 222.
Crosby's case, 102.
Cross's case, 454, 661.
Crowther's case, 421.
——— v. Hopwood, 101, 315.
Crump's case, 473.
Crunden's case, 663.
Culkins's case, 568, 578,
Cullen's case, 417.
Cundell v. Pratt, 131, 134, 135

Cundick's case, 328.
Cunliffe v. Sefton, 3, 161, 162.
Curling's case, 696.
Currie v. Child, 161.
Curry v. Walter, 540.
Curtis's case, 621, 626, 631, 632.
Curvan's case, 559, 598.
Cuthel's case, 534.

Dade's case, 408.
Dakin's case, 644.
Dalby's case, 688.
Dalison v. Stark, 3.
Dalrymple v. Dalrymple, 237.
Dalton v. Colt, 97.
Dance v. Robson, 156.
Dartmouth lady v. Roberts, 158.
Davenport's case, 494.
Davies's *alias* Silk's case, 254.
——— case, 664, 739.
Davis's case, 101, 120, 167, 258, 260, 301, 399, 720, 721.
——— v. Dale, 128.
——— v. Williams, 159.
Dawber's case, 121.
Dawson's case, 77, 408, 700.
Deakin's case, 516.
Dean's case, 778.
Deane v. Thomas, 230.
De Benger's case, 126.
De Berenger's case, 315, 326.
Deeley's case, 82.
Deering's case, 177.
Densley's case, 718.
De la Motte's case, 10.
Delany v. Jones, 540.
De Londo's case, 552.
Denn v. Fulford, 155.
Denn v. Spray, 22.
Derrington's case, 35.
De Sailly v. Morgan, 140.
Dewhurst's case, 17, 47, 48.
Dewsnaps's case, 184.
Dey's case, 784.
Dickenson v. Shee, 127.
Dickinson's case, 473.
Dicks's case, 785.
Digby v. Thompson, 526.
Dingler's case, 51.
Dingley's case, 280.
Dixon's case, 18, 291, 456, 618, 665, 786.
——— v. Vale, 132.
Dobb's case, 280.
Dobbin v. Cornack, 230.
Dobson's case, 369.
Dodd's case, 112, 530, 535.
——— v. Norris, 135.
Doe v. Cartwright, 3.
——— v. Deakin, 19.
——— v. Tarver, 163.
——— v. Jesson, 19.
——— v. Nepean, 20.
——— v. Ridgway, 24.
——— v. Wallinger, 163.
——— v. Wilson, 14.
——— v. Wood, 128.
Doker v. Haster, 113.
Doncaster, Mayor of, v. Day, 158.
Donnally's case, 741, 743, 745. 746.
Donnison's case, 533.
Donnevan's case, 204.
Doran's case, 2, 207.
Douglas's case, 368, 370.
Dover v. Maestaer, 103.
Dowling's case, 85.
Downes's case, 404.
——— v. Moreman, 160.
Dowsell's case, 445.
Drake's case, 229.
Drummond's case, 24.
Du Barré v. Lovette, 145.
Dubois v. Beresford, 529.
Duce's case, 121.
Dudman's case, 679.
Duffey's case, 569.
Duffin's case, 656.
——— v. Smith, 152.
Duncan v. Scott, 156.
——— v. Thwaites, 540.
Dunston's case, 682.
Dunnel's case, 94.
Dunn's case, 33, 70, 338, 720.
Dupee's case, 359.
Durham's case, 120.

Durore's case, 82.
Dyer's case, 716, 717.
Dyson's case, 647, 656.

Earl v. Lewis, 161.
East v. Chapman, 132.
Eastall's case, 513.
Eccle's case, 314, 316, 317, 320, 325.
Eden's case, 674.
Edgar's case, 576.
Edmeads's case, 637.
Edmond's v. Rowe, 97.
——— v. Walter, 127.
Edmondson v. Stephenson, 540.
Edsall's case, 406,
Edwards's case, 31, 77, 134, 177, 231, 286, 510, 522, 577, 749, 761, 771.
Egerton's case, 58.
Eggington's case, 262.
Eicke v. Nokes, 150.
Eldershaw's case, 778.
Eldrige's case, 28.
Ellicombe's case, 11.
Ellins's case, 76, 699, 700.
Elliott's case, 394.
Ellis's case, 44, 59, 106, 118.
Ellison's case, 205.
Ellor's case, 418.
Elmstead's case, 749.
Else's case, 167, 301.
Elsmer v. Inhab. of hundred of St. Briavells, 204.
Elsworth's case, 397.
Elsworthy's case, 715.
Emden's case, 676.
Emmett v. Lyne, 211.
Ennis v. Donnisthorne, 158.
Etherington's case, 336.
Evans's case, 77, 225, 332, 362, 571, 694.
——— and Finche's case, 265.
Ewer v. Ambrose, 136, 158.
Eyre v. Palsgrave, 160.

Falkner's case, 28.
Fallow's case, 737.
Farley's case, 333.
Farre's case, 270.
Farrel's case, 471.
Farrington's case, 19, 206.
Fasset v. Brown, 162.
Fauntleroy's case, 413.
Fawcett's case, 291, 382.
Fearshire's case, 52.
Fellows v. Stewart, 233.
Fenton's case, 560, 582.
Ferguson's case, 317, 561, 591.
Ferrers's case, 624, 780.
Fidler's case, 555.
Filliter v. Minchin, 162.
Finnacane's case, 445.
Finden v. Westlake, 540.
Fisher's case, 45, 540.
——— v. Heming, 147.
——— v. Kitchinham, 157.
——— v. Lane, 155.
Fisherman's case, the, 742.
Fitzgerald's case, 394, 413.
——— v. Elsee, 162.
Flanning's case, 180.
Flannagan's case, 274.
Fleet's case, 540.
Flemming's case, 52.
Fletcher's case, 39, 119, 479, 760.
Flint's case, 369.
——— v. Pike, 540.
Folke's case, 710.
——— v. Chad, 137.
Foot v. Hayne, 145.
Forbes's case, 51, 189.
Ford's case, 100, 103, 326, 614, 640.
Forde v. Skinner, 211.
Forsgate's case, 515.
Forsyth's case, 86, 223, 225, 242.
Foster's case, 21, 40, 81, 560, 616, 675.
——— Foster v. Compton, 157.
Fountain v. Young, 145.
Fowle's case, 326.
Fowler's case, 316.
——— v. Saunders, 661.
Fox's case, 105.

Frances's case, 76, 390, 737.
France v. Lucy, 10.
Frank's case, 301.
Fraser's case, 118, 119.
Frederick's case, 114.
Freeman's case, 343.
——— v. Arkell, 12.
Freeth's case, 366, 367.
French's case, 270, 517.
Friend's case, 133, 142, 592.
Frith's case, 223.
Frond's case, 419.
Frost v. Holloway, 135.
Fuller's case, 264, 750.
——— v. Fotch, 160.
Furley v. Newnham, 90.
Furneaux's case, 345.
Furness v. Cope, 23.
Fullwood's case, 116, 195.

Gaby's case, 517.
Gade's case, 426.
Galloway's case, 173, 721.
Gammon's case, 710.
Gardner's case, 8, 752.
Garland's case, 262.
———- v. Schoones, 157.
Garrells v. Alexander, 162.
Gascoigne's case, 740, 753.
George's case, 671.
———- v. Surrey, 162.
Gibbon's case, 260, 275.
Gibbs v. Philipson, 93.
Gibson's case, 164, 207, 268.
Gilbert's case, 494.
Gilchrist's case, 406.
Gilham's case, 35, 97, 145, 671.
Gill's case, 211, 314, 326, 328, 774.
Gillow's case, 219, 653, 656.
Girdwood's case, 769, 770, 772.
Glanfield's case, 200.
Glanvill's case, 293.
Glasburne-bridge case, 248.
Glover's case, 442.
Gnosil's case, 734.
Goate's case, 391.
Goddard v. Smith, 226.
Godefroy v. Jay, 155.
Godfrey v. Norris, 162.
Goff's case, 186.
Goldsmid v. Bromer, 230.
Goodburn v. Marley, 448.
Goodhall's case, 363.
Goodhay v. Hendry, 126.
Goodtitle v. Braham, 164.
Goodtitle v. Welford, 112.
Gordon's case, 7, 9, 15, 21, 64, 90, 154, 168, 196, 243.
Goss v. Watlington, 23.
Gotley's case, 312.
Gough's case, 173.
Gould's case, 334.
Gowan's case, 200.
Graham's case, 81.
Grant's case, 101.
Gray's case, 104, 279.
Gregory v. Wilks, 381.
Green v. Goddard, 214.
Greenif's case, 725.
Greenough v. Gaskell, 145, 146, 151.
Greenwood v. Curtis, 237.
Grey's case, 585, 737.
——- case, (Lord), 194, 315.
Griepe's case, 682.
Griesley's case, 454.
Grigg's case, 114, 115.
Griffin's case, 30, 38.
Griffiths v. Williams, 163, 164.
Grindall's case, 679.
Grindley's case, 784.
Grosvenor's case, (Lord) 455.
Grout's case, 560.
Gully's case, 103.
Gully v. Bishop of Exeter, 11.
Gurney v. Langlands, 164.
Gutch's case, 535.
Gyles v. Hill, 155.

Hadfield's case, 383, 784.
Haine's case, 256.
Hall's case, 30, 40, 164, 256, 345, 347, 533, 735.
Hallard's case, 264.
Halloway's case, 280, 522.
Hamilton's case, 334.
Hammon's case, 482.

Hammond's case, 317, 322, 450.
Hampden's case, 111.
Hampton's case, 404.
Hancock's case, 263.
——— v. Sandham, 614,
Hanks's case, 673.
Hannam v. Mockett, 510.
Hanson's case, 66.
Harding's case, 483.
——— v. Greening, 535.
Hardwick's case, 33.
Hardy's case, 61, 62, 63, 64, 128, 134, 147, 148, 149, 321, 322, 324.
Hargrave's case, 561, 568.
Harley's case, 650.
Harman's case, 754.
Harpur's case, 671.
Harris's case, 46, 52, 189, 200, 264, 382, 622, 651.
——— v. Tippett, 140.
Harrison's case, 50, 56, 142, 422, 423.
Harrison v. Blades, 162.
——— v. Hodgson, 215.
Harley's case, 675, 676.
Hartley's case, 341.
Hart's case, 406, 507, 538.
Harvey's case, 425, 495, 536.
——— v. French, 536.
——— v. Morgan, 10.
Harwood's case, 75.
Haslam's case, 118, 722.
Hasting's case, 693.
Haswell's case, 707.
Hathaway v. Barrow, 107.
Haughton's case, 205, 288.
Hawkeswood's case, 165, 392, 396.
Hawkins's case, 258, 271, 736.
Haydon's case, 254.
Hayman's case, 250, 462.
Haynes's case, 293.
Hayward's case, 538, 604, 651.
Haywood's case, 287.
Hazy's case, 7, 56.
Headge's case, 345.
Healey's case, 84, 486.
Hearne's case, 39.
Heath, *ex parte*, 225.
Hebb's case, 346.
Hedge's case, 304.
Hemp's case, 685.
Hempstead's case, 335.
Henderson's case, 782.
Hennell v. Lyon, 158.
Henry v. Adey, 154.
Herbert's case, 316.
——— v. Herbert, 237.
Heming's case, 769.
Hescott's case, 671.
Hevey's case, 62, 319, 384, 405.
Heward v. Shipley, 108.
Hicks v. Gore, 196, 197.
Hickman's case, 84, 512, 578, 745, 747, 748, 749, 751.
Higgs v. Dixon, 161.
Higgins's case, 42.
Highfield v. Peake, 156.
Higley's case, 296.
Hilles v. Inhab. of Shrewsbury, 205.
Hill's case, 76, 368, 449, 556.
Hill v. Coombe, 128.
Hinchcliffe's case, 644.
Hindmarsh's case, 13.
Hind's case, 230.
Hinxman's case, 45.
Hobson's case, 49, 347.
Hodge's case, 502, 550.
Hodgson's case, 68, 69, 72.
Hodnett v. Foreman, 161.
Hoggin's case, 341.
Holden's case, 189, 400.
Holding's case, 131, 135.
Holland's case, 670.
Hollingberry's case, 314, 319.
Holloway's case, 473.
Holmes's case, 199.
Honeywood v. Peacock, 162.
Hood's case, 114.
Hoost's case, 393.
Hope's case, 788.
Hopper's case, 156.
Horford v. Morris, 238.
Horne Tooke's case, 322.
Horne v. Noel, 230.
Horner's case, 739.

Horvell's case, 398.
Hough's case. 69.
Hovill v. Stephenson, 162.
Howard's case, 7, 14, 703.
Howel v. Lock, 124.
Howes's case, 32.
Howorth's case, 36, 45.
Hube's case, 2.
Huck's case, 683, 684.
Huet's case, 45, 70.
Hugget's case, 624, 625.
Huggins's case, 593.
Hughes's case, 6, 260, 288, 339, 651, 739, 786.
Hungerford's case, 282.
Hunsdon, Lord, v. Lady Arundell, 159.
Hunter's case, 181, 407, 423.
Hunt's case, 4, 5, 10, 60, 74, 76, 189, 533, 614, 655, 731.
Hurd v. Moring, 150.
—— v. Martin, 73.
Hurry's case, 680.
Hutchinson's case, 24, 518, 757, 759.
Hutchison v. Birch, 630.
Hyman's case, 716.

Ilderton v. Ilderton, 237.
Ile's case, 674.
Imason v. Cope, 215.
Ince's case, 760.
Ingram's case, 786.
——— v. Dade, 125.
Irving v. Mally, 513.
Isaac's case, 201, 298.

Jackson's case, 130, 363, 488, 499, 687, 709, 742, 743, 751, 766.
Jacob's case, 45, 228, 236, 764.
James, *exparte*, 115.
———'s case, 157, 233, 475.
——— v. Campbell, 212.
J'Anson v. Stuart, 664, 666.
Jarvis's case, 275.
Jeffreys v. Walter, 448.
Jenkins's case, 22, 38, 268.
Jenks's case, 82, 281.
Jenning's case, 710.
Jepson's case, 773.
Jervis's case, 714.
Jobling's case, 276.
Johns' case, 25, 117.
Johnson's case, 11, 108, 181, 254, 446, 537, 574, 760.
——— v. Lawson, 22.
——— v. Leigh, 630.
Johnstone's case, 82, 84.
Joice's case, 304.
Jolliffe's case, 14, 314.
Jones and Bever's case, 283.
——'s case, 30, 42, 44, 47, 48, 120, 174, 179, 265, 395, 400, 401, 402, 406, 413, 420, 455, 511, 519, 671, 677, 684, 745, 747, 785, 789.
——'s (Martha) case, 266.
—— v. Edwards, 10.
—— v. Mason, 161.
Jordan's case, 242.
Journeymen Tailors' case, 313, 314.
Judd's case, 207.

Keate's case, 596.
Kelby v. Wilson, 513.
Kelly's case, 167, 578, 717.
Kempton v. Cross, 159.
Kessal's case, 558, 607.
Kimberty's case, 319.
Kinder's case, 413.
King's case, 160, 167, 289, 387, 717.
Kingston's (Duchess of) case, 30, 144, 243.
Kinnersley's case, 526.
Kirwan's case, 5.
Kirkwood's case, 68, 69, 408.
Kitchen's case, 650.
Knell's case, 538.
Knewland's case, 744, 753.
Knight's case, 473, 540, 560, 584.
Knight and Roffey's case, 280.
Knill's case, 685, 687.
Kroehl's case, 327.

Lacie's case, 188.
Lacon v. Higgins, 237, 239.
Lafone's case, 119.
Lambe's case, 28, 46, 47, 53, 474.
Lambert's case, 64, 65, 526, 537.
Lane's case, 586.
Lane v. Degberg, 213.
Langhorn's case, 178.
Langstaffe's case, 601.
Lapier's case, 471, 734, 738, 739.
Lara's case, 292, 363.
Lautour v. Teesdale, 238, 241.
Lavender's case, 223, 482.
Lavey's case, 299.
Law's case, 114.
Lawley's case, 116, 544.
Lawrence v. Hedger, 615.
Lawrence's case, 255.
Laycock's case, 685.
Layer's case, 47, 61, 133, 136.
Lee's case, 122, 172, 320, 392, 437, 540, 686.
—— v. Berrell, 153.
—— v. Risdon, 499.
Leech's case, 341.
Leefe's case, 678, 683.
Leigh's case, 477.
Le Merchand's case, 9.
Lennard's case, 309.
Levet's case, 639.
Levi v. Levi, 317.
Levy's case, 85, 478.
—— v. Edwards, 215.
—— v. Pope, 150.
Leward v. Baseley, 214.
Lewis's case, 134, 256, 292, 385, 413, 650, 674.
Lewis v. Clement, 540.
—— v. Sapio, 163.
—— v. Walter, 540.
Lincoln's case, 674.
Lindo v. Belisario, 230, 238.
Lindsey's case, 132, 345.
Lingate's case, 31.
Lister v. Priestly, 8.
Lithgo's case, 263.
Little's case, 175.
Lloyd's case, 24, 31, 378, 452, 578, 659, 769.
Lloyd v. Passingham, 133.
Locker's case, 114.
Lockett's case, 386, 416, 420.
Lockhart's case, 37.
Lockhart Gordon's case, 195.
Logan v. Burton, 450.
Lolley's case, 243.
Lone's case, 671.
Long's case, 35, 561, 589, 590.
Longden's case, 598.
Longstreeths's case, 488, 499.
Loom's case, 78.
Lovat's (Lord) case, 124, 322.
Love's case, 98.
Loveless's case, 668.
Lowe v. Jolliffe, 136.
Lucas v. Nockells, 513.
—— v. Novosilieski, 128.
Luckup's case, 108.
Lutterell v. Reynell, 142.
Lynall v. Longbotham, 448.
Lynch's case, 559, 610.
Lynn's case, 328.
Lyon's case, 238, 264, 392, 413, 423.

Macalley's case, 75, 83, 570, 627.
M'Arther's case, 675.
Macarty's case, 320.
Macauley's case, 739.
Macbride v. Macbride, 135.
M'Cartney's case, 21.
M'Craw v. Gentry, 162.
M'Donagh's case, 523.
M'Daniel's case, 168, 573, 738.
M'Dermot's case, 651.
M'Dougall v. Claridge, 540.
Macewan's case, 576.
M'Guire's case, 6.
M'Kenzie's case, 21.
Mackerel's case, 555.
M'Keron's case, 680.
M'Intosh's case, 416, 420.
M'Leod v. Wakley, 533.

M'Makin's case, 167, 717.
Macmillan's case, 575.
M'Namee's case, 479, 481.
Madden's case, 173, 721.
Maddeson v. Shore, 88.
Maddock's case, 385.
Madox's case, 478.
Major's case, 771.
Malony's case, 46, 130.
Manchester case, 727.
Mann v. Carey, 160.
Manning's case, 558.
March's case, 206, 787.
Margett's case, 272.
Mark's case, 677.
Marsh v. Collnett, 160.
Marston v. Downes, 9.
Martin's case, 95. 265, 291, 361, 509, 574, 577, 784.
Mason's case, 605, 695, 739.
Mawgridge's case, 603, 640.
Mawley's case, 313, 314.
Mawson v. Hartsink, 136.
May's case, 684, 695.
Mayhew's case, 687.
Maynard's case, 271, 296.
Mayne v. Fletcher, 533.
Mazagora's case, 401.
Mead's case, 24, 117, 215, 345, 507, 559, 621, 646.
Mead v. Robinson, 160.
Mead v. Young, 383.
Medley's case, 666.
Mee v. Read, 98.
Meeking v. Smith, 93.
Meeres's case, 485.
Melen v. Andrews, 38.
Mellish's case, 339, 340.
Mellor's case, 451.
Melville's case, Lord, 154.
Merceron's case, 36.
Meredith's case, 670.
Merriman v. Chippenham, Hundred of, 740.
Middlehurst's case, 76.
Middleton v. Janvers, 238.
——— v. Sauverin, 237.
Middowcroft v. Gregory, 233.
Mildrone's case, 98.
Miles v. Rose, 14.
Mills' case, 30.
Millar v. Kendrick, 138.
Millard's case, 68.
Miller's case, 103, 677.
Millor's case, 186.
Milner v. Maclean, 377.
Minton's case, 25, 202.
Missingham's case, 715, 718.
Mitchell's case, 224, 417, 418.
——— v. Rabbetts, 161.
Moffatt's case, 396, 415.
Mogg's case, 59, 288.
Moir's case, 643.
Monroe v. Twisleton, 113.
Moore's case, 10, 46, 309, 345, 663, 667, 699, 739, 789.
Morfit's case, 469.
Morgan's case, 98, 164.
Moriarty v. Brooks, 652.
Morley's case, Lord, 50, 557, 596.
Morphew's case, 55.
Morris's case, 158, 409, 659, 662, 675, 721, 785.
——— v. Miller, 4.
Morton's case, 165, 233, 393, 396.
Mosley's case, 26, 27, 37.
Mott's case, 287.
Mucklow's case, 475, 478.
Munday's case, 500.
Murlis's case, 128.
Murphy's case, 561, 588.
Murray's case, 265, 321.
——— John, 344.
Murray v. Lonter, 533.
Muscot's case, 107.
Mynn v. Jolliffe, 146.
Mytton's case, 654.

Naagen Swendsen's case, 116.
Nailor's case, 641.
Nash's case, 446.
Neil's case, 660.
Nettleton's case, 343.
Neville's B., case, 660.

Neville's S., case, 660.
Nibb's case, 78.
Nichol's case, 210, 680, 682.
Nicholls v. Dowding, 126.
——— v. Parker, 22.
Nicholson's case, 498, 727.
Noake's case, 760.
Noble v. Adams, 513.
Norden's case, 750.
Norreg Thompson's case, 264.
Norris's case, 500.
North's case, 204.
Norton's case, 79.
Nutbrown's case, 266.
Nute's case, 35.
Nutt's case, 539.

Oakley's case, 377.
Offord's case, 781.
Ogden's case, 437.
Ogilvie's case, 81.
Omealy v. Newell, 291.
Omichund v. Barker, 96, 97.
Oneby's case, 558, 602.
Oldroyd's case, 53, 137.
Orrell's case, 177.
Osborne's case, 528.
Ovenden v. Palmer, 463.
Owen's case, 167, 288, 333, 718.

Packer's case, 515.
Pacton v. Douglas, 130.
Paddle's case, 769.
Page's case, 224.
Pain v. Beeston, 141.
Paine's case, 529.
Palmer's case, 232, 399, 401, 402, 446, 486.
Palmerston's case, Lord, 158.
Pappeneau's case, 659, 662.
Paradice's case, 482.
Param's case, 118.
Parfait's case, 755, 766.
Parkhouse's case, 316.
Parke's case, 384, 400.
——— v. Strockley, 101.
Parker's case, 142, 500, 781.
Parker v. M'William, 124.
Parkes's case, 496.
Parkin's case, 179, 521.
Parkins v. Hawkshaw, 145, 150.
Parmenter's case, 269, 277.
Parr's case, 427.
Parson's case, 323.
Patch's case, 789.
Pateman's case, 395. 415.
Patram's case, 722.
Patrick's case, 519.
Pattison v. Jones, 540.
Paty's case, 287.
Payne's case, 637, 652.
Pazel's case, 600.
Peace's case, 80.
Peacock's case, 389.
Pear's case, 468, 488, 489.
Pearce's case, 486, 533, 703.
Pearce v. Whale, 8.
Pearson's case, 53, 699, 703.
Pease's case, 659, 662.
Peat's case, 295, 469, 734.
Peck's case, 344.
Pedley's case, 200, 677.
——— v. Paige, 161.
——— v. Wellesley, 113.
Peltier's case, 530.
Pengal v. Nicholson, 124.
Penson's case, 232.
Pepy's case, 682, 689.
Perkins's case, 295.
Perrott's case, 368.
Perry's case, 116.
Petrie's case, 333.
Peyton's case, 271.
Phillips's case, 3, 69, 191, 192, 193, 289, 472, 617.
——— v. Fowler, 108.
Philps's case, 19, 43, 206, 209.
Phipoe's case, 507, 512, 734.
Pickering v. Rudd, 261.
Pickersgill's case, 107.
Picket's case, 271.
Pickford's case, 771.
——— v. Gutch, 528.
Picton's case, 239.
Piercy's case, 109.

Pike's case, 26.
Pinkney's case, 292.
Pinney v. Pinney, 159.
Pitt's case, 244.
Pitton v. Walter, 156, 157.
Plaxton v. Dare, 22.
Plestow's case, 367.
Plumer's case, 538, 700.
Plunkett v. Collett, 149, 152, 537.
Plympton's case, 244.
Pollman's case. 315, 327.
Pooley's case, 165, 507, 700.
Pomeroy v. Baddeley, 123.
Pope's case, 475.
Porter v. Cooper, 155.
Portreis v. Tondear, 230, 240.
Potts's case, 361, 408.
—— v. Durant, 161.
—— v. Sparrow, 544.
Pouget v. Tomkins, 233.
Poulton's case, 566, 567.
Powell's case, 401, 405, 406.
Pratley's case, 478.
Pratt's case, 495.
Pressley's case, 48.
Preston's (Lord) case, 91.
Price's case, 676, 722, 730.
Priddle's case, 100.
Priestley's case, 49.
Prince v. Blackburn, 161.
Prisoners' in K. B. case, 314.
Probert's case, 201.
Prosser's case, 173, 277, 722.
Prowes's case, 522.
Puckering's case, 510, 720.
Puddifoot's case, 78.
Pulley's case, 566.
Punshon's case. 673.
Purefoy's case, 54.
Pywell's case, 320, 323.

Queen's (the) case, 41, 98, 128, 141, 322.

Radbourne's case, 52, 54.
Radcliffe v. Burton, 630.
Radford v. M'Intosh, 8.
Rae's case, 592.
Ralling's case, 108.
Rambert v. Cohen, 3.
Ramsay's case, 576.
Ramsbottam's case, 159.
Randall's case, 396, 415.
Rands v. Thomas, 101.
Ranger's case, 287.
Ransom's case, 506, 512, 700.
Ratcliffe's case, 197.
Ravenscroft's case, 416.
Rawlins's case, 285, 286.
Rawson's case, 181.
Reader's case, 207.
Reading's case, 130, 406.
Reason's case, 27, 557, 598.
Reave's case, 744, 750.
Redford v. Birley, 728, 731.
Reed's case, 4, 46.
Reculist's case, 165.
Rees's case, 181, 698.
—— v. Bowen, 157.
—— v. Margison, 155.
Reeve's case, 407.
Reg. v. Duchess of Buccleugh, 460.
Reilly's case, 691, 692.
Rex v. All Saints, Worcester, 114.
—— v. Bear, 405.
—— v. Billinghurst, 232.
—— v. Birmingham, 233.
—— v. Bishop Auckland, 463.
—— v. Brampton, 238, 241.
—— v. Broughton, 106.
—— v. Brown, 461.
—— v. Buckeridge, 460, 463.
—— v. Bucknall, 248.
—— v. Inhab. of Bucks, 245.
—— v. Burton-upon-Trent, 233.
—— v. Case, 654.
—— v. Castell Careinion, 101.
—— v. Choiger, 114.
—— v. Clifton, 457.
—— v. Colley, 124.
—— v. Cooke James Stamp Sutton, 93.

Rex v. Cumberworth. 457.
v. Derby, 249.
—— v. Devon, 247, 249.
—— v. Dowlin, 677, 680.
—— v. Eardisland, 462.
—— v. Ecclesfield, 247, 459.
—— v. Edmonton, 451.
—— v. Eriswell, 49, 54.
—— v. Farleigh, 12.
—— v. Flecknow, 458.
—— v. Great Canfield, 452.
—— v. Glamorgan, 246, 248.
—— v. Hammersmith, 107, 452, 458, 462.
—— v. Hatfield, 459.
—— v. Hendon, 248, 251.
—— v. Hepworth, 457.
—— v. Hornsey, 461, 462, 463.
—— v. Hunt, 533.
—— v. Jagger, 116.
—— v. Kent, 246, 250.
—— v. Kerrison, 250.
—— v. Kingsmore, 459.
—— v. King's Newton, 459.
—— v. Kirdford, 111.
—— v. Lancashire, 246.
—— v. Landulph, 458.
—— v. Leake, 451, 457.
—— v. Lyon, 453.
—— v. Lindsey, 250.
—— v. Mayor, &c. of Liverpool, 456.
—— v. Longnor, 164.
—— v. Machynlleth, 248, 459.
—— v. Marquis of Buckingham, 247.
—— v. Middlesex, 246.
—— v. Montague, 14.
—— v. Netherthong, 456, 459.
—— v. Northampton, 246, 251.
—— v. Norwich, 251.
—— v. Nunn, 188.
—— v. Oxfordshire, 246, 247, 248, 456.
—— v. Paddington Vestry, 457.
Rex v. Pelling, 463.
—— v. Punshon, 221.
—— v. Ragley, 456.
—— v. Reilly, 236.
—— v. Roddam, 89.
—— v. St. Andrews, 461.
—— v. St. Benedict, 249, 457.
—— v. St. Botolph, Ministers, &c. of, 291.
—— v. St. George, Hanover square, 456, 461.
—— v. St. Giles, Cambridge, 459, 460.
—— v. St. Mary, Nottingham, 130.
—— v. St. Pancras, 461.
—— v. Weonard's, 453.
—— v. Salop, 247, 450.
—— v. Severn and Wye Railway Company, 450.
—— v. Sheffield, 250.
—— v. Somerset, 456.
—— v. Stourbridge, 12.
—— v. Mayor of Stratford-upon-Avon, 251.
—— v. Tibshelf, 232.
—— v. Townsend, 462.
—— v. Treasurer of Exeter, 180.
—— v. Twyning, 14.
—— v. Upper Boddington, 145.
—— v. Upton-on-Severn, 453.
—— v. Wandsworth, 452, 457, 463.
—— v. Washbrook, 458.
—— v. Watkinson, 151.
—— v. West Riding of Yorkshire, 459.
—— v. West Riding of Yorkshire, 47, 249.
—— v. Wheaton Aston, 111, 463.
—— v. Wilts, 250, 251.
—— v. Winwick, 622.
—— v. Woburn, 129.
—— v. Wroxton, 232.
—— v. Yarton, 462.

Reynold's case, 760.
Rhodes' case, 682, 685.
Rice's case, 289.
Richards's case, 32, 181, 396, 450, 788.
Richardson's case, 721, 757.
Rickett's case, 223. 657.
Rickman's case, 18, 58, 199, 200
Reekspear's case, 710,
Ridgelay's case, 309.
Ridley's case, 210, 444.
Ring's case, 88, 90.
Rispal's case, 314.
Robey's case, 181.
Robert's case, 66, 223, 319, 326.
Robins's case, 739.
Robinson's case, 71, 80, 184, 256, 319, 481, 486, 518, 657, 703, 770.
Robinson v. Jermyn, 527.
Robson v. Kemp, 157.
Rogers's case, 6, 7, 56, 269, 621.
Roper's case, 684.
Rose's case, 760.
Rose v. Blakemore, 143.
Rosinski's case, 211.
Ross's case, 549.
Roubattel's case, 186.
Rough's case, 510.
Row's case, 33.
Rowe v. Brenton, 156, 159.
Rowland's case, 118.
Rowland v. Ashby, 45.
Rowley's case, 599, 680.
Rudd's case, 104, 105, 121.
Ruding v. Smith, 237, 238, 240, 241.
Rugby Charity v. Merryweather, 452.
Rush v. Smith, 128.
Rushworth's case, 369, 419.
Rust's case, 261.
Ruston's case, 95.
Rustell v. Macquister, 537.
Russell's case, 255, 322, 454, 455, 659, 710.
Russen's case, 710.

Sainbury's case, 670.
Salisberry's case, 699.
Salmon's case, 535.
Samuel v. Payne, 612.
Saunders's case, 169, 580.
Sayer's case, 150.
——— v. Kitchin, 11.
Scott's case, 517.
——— v. Clare, 3.
Scrimshire v. Scrimshire, 237.
Scudder's case, 193.
Sculley's case, 643.
Sear's case, 475.
Searing's case, 509, 511.
Sedley's case, 525, 663.
Sefton's case, 266, 267.
Selby v. Harris, 156.
Self's case, 594.
Sells v. Hoare, 98.
Semple's case, 491.
Senior's case, 561, 566, 590.
Serjeant's case, 112, 114.
Seward's case, 316.
Sewel's case, 107.
Sexton's case, 30.
Shadbolt's case, 656.
Shakespeare's case, 81.
Sharp v. Scoging, 136.
Sharwin's case, 83, 577, 756, 760.
Shaw's case, 699, 725.
Sheen's case, 567.
Shepherd v. Shorthouse, 159.
Sheppard's case, 19, 387, 416.
Sheridan's case, 5.
Sherman's case, 119.
Sherrington's case, 402, 519.
Shiles, *ex parte*, 223.
Shukard's case, 399.
Sidney's case, 63.
Sigel v. Jebb, 448.
Simon's case, 741, 744.
Simpson's case, 27, 257, 332, 561, 590.
——— v. Hill, 356.
——— v. Smith, 128.
Sissinghurst-house case, 570.

Sissons v. Dixon, 14.
Skerrit's case, 303.
Skinner's case, 461.
Skutt's case, 700.
Sloper's case, 702.
Skinney's case, 461.
Smith's case, 6, 18, 27, 45, 52, 57, 71, 103, 114, 153, 155, 173, 210, 225, 255, 262, 266, 331, 403, 446, 567, 635, 659, 661, 722, 759.
———, Elizabeth, 340, 344, 346.
———, John, 278.
———, Thomas, 339.
——— v. Beadnell, 132.
——— v. Huson, 233.
——— v. Maxwell, 236.
——— v. Prager, 107.
——— v. Rummen's, 107.
——— v. Sainsbury, 163.
——— v. Stewart, 93.
——— v. Taylor, 8, 528.
——— v. Young, 4, 10.
Smithson's case, 156.
Smollett's case, 526.
Smyth's case, 271, 377, 379.
Snow's case, 558, 608.
Soare's case, 167, 301, 399, 408.
Solita v. Yarrow, 163.
Soloman's case, 678.
Southern's case, 296, 446.
Southerton's case, 312.
Spalding's case, 199.
Spark v. Middleton, 146.
Sparkes's case, 144.
Spear's case, 483.
Spenceley v. Willott, 128.
Spencer's case, 339, 369, 676, 679, 741, 744.
Spiller's case, 561, 591.
Sponsonby's case, 403.
Spragg's case, 10, 314.
Sprigg's case, 331.
Springer's case, 769, 773.
Squires's case, 342, 592, 786.
Stafford's (Lord) case, 322.
Stanley's case, 633, 724.
——— v. Jones, 544.
Starling's case, 315.
Statham's case, 516.
Stayte v. Farquaharson, 233.
Stedman's case, 557, 596.
Stephens v. Myers, 211.
Steptoe's case, 42.
Stevens v. Bagwell, 544.
Stevenson's case. 622.
Stewart's case, 167.
Stiles v. Nokes, 540.
Stock's case, 274, 275, 479, 481.
Stocken v. Carter, 617.
Stokes's case, 178.
Stockley's case, 622, 631, 632.
Stone's case, 61, 62.
——— v. Blackburne, 124.
Story's case, 366.
——— v. Story, 237.
Strafford's case, 53, 149.
Stranger v. Searle, 162.
Stratton's case, 321.
Streek's case, 178.
Stuart v. Lovell, 537.
Studdy v. Sanders, 150.
Sull's case, 79, 81.
Sullen's case, 344, 485.
Sulston v. Norton, 244.
Sutcliffe's case, 776.
Sutton's case, 529.
Swan's case, 75.
Swatkins's case, 36, 47, 177, 208.
Sweeting v. Fowler, 80.
Swift v. Swift, 130.
Swinnerton v. Marquis of Stafford, 161.
Sykes v. Dunbar, 150, 152.

Tacey's case, 556.
Taft's case, 386.
Talbot v. Hodgson, 162.
Tannet's case, 81, 360.
Taplin's case, 741.
Tarrant's case, 48, 316.
Tattersall's case, 166.
Tattershall's case, 67.
Tavener's case, 70.
Tawney's case, 670.
Taylor's case, 99, 181, 202, 334, 347, 386, 516, 527, 550, 665, 676, 679.
——— v. Foster, 145.

Teague's case, 165, 393, 408.
Teal's case, 101.
Teasdale's case, 108.
Tellicote's case, 47, 48.
Tessymond's case, 591.
Testick's case, 421.
Tharpe v. Gilmore, 163.
Thatcher v. Waller, 54.
Thomas's case, 46, 424, 618, 714, 730, 755, 756.
——— v. Ansley, 2.
——— v. Newton, 133.
Thompson's case, 268, 334, 423, 521, 578.
Thomson's case, 487, 559, 613, 632.
Thorley's case, 339.
——— v. Lord Kerry, 526.
Thornton's case, 34, 44, 52.
——— v. Roy. Ex. Ass. Co. 137.
Thorpe's case, 558, 608.
Tibbs v. Smith, 509.
Tickel v. Read, 214.
Tilly's case, 109, 725.
Timothy v. Simpson, 198, 213, 614.
Tinkler's case, 23.
Tippet's case, 28, 453.
Todd's case, 516.
Tohayle's case, 662.
Tolfree's case, 477. 787.
Tomlinson's case, 579.
Tonge's case, 38, 119.
Tooke's case, 61, 65, 155.
Tooker v. Duke of Beaufort, 154.
Tooley's case, 615, 623, 624, 625.
Topham's case, 527, 539.
Towle's case, 658.
Townley's case, 85.
Trapshaw's case, 270.
Treeves's case, 290.
Treharne's case, 85.
Truman's case, 229, 233, 234.
Trusty's case, 755, 756.
Tuchin's case, 526.
Tucker's case, 94, 711, 775.
Tullay v. Read, 214.
Tunnard's case, 491.
Turberville v. Savage, 211.
Turner's case, 40, 56, 80, 282, 284, 316, 320, 334, 517, 600, 692, 715, 722.
——— v. Pearte, 124.
Twistleton's case, 197.
Tye's case, 579.
Tyers's case, 342, 345.
Tyler's case, 33.

Uncle v. Watson, 23.

Vaillant v. Dodemead, 145.
Van Butchell's case, 561, 589.
Vandercomb's case, 59, 281, 283, 284, 665.
Van Muyen's case, 473.
Varley's case, 298.
Vaughan's case, 244.
Venner's case, 458.
Verelst's case, 7, 14, 673.
Vertue v. Lord Clive, 315.
Ville de Varsovie, case of the, 101.
Villeneuve's case, 365.
Virgil's case, 216.
Voke's case, 71, 654.
Vyse's case, 507.

Waddington's case, 374, 524.
Wade's case, 95, 99, 178.
Wagstaff's case, 769.
Waite's case, 484.
Wakefield's case, 115, 116, 138, 195, 315.
Wakeling's case, 369.
Walker's case, 80, 98, 384, 503, 518, 560, 584, 714, 725.
——— v. Kearney, 101.
——— v. Wildman, 146.
Walkley's case, 30, 719.
Wall's case, 397.
Waller's case, 684.
Wallis's case, 173, 206.
Walsh's case, 470r
Walter's case, 222, 224, 225, 534.
Wannop's case, 378.

Ward v. Man, 118.
Wardle's case, 84. 155, 342, 382, 402.
Warickshall's case, 29, 36. 37.
Warner's case, 623.
Warren's case, 670.
Warren v. Warren, 538.
Warwick's, Earl of, case, 103.
Watson's case, 1, 4, 62, 63, 71, 124, 126, 131, 136, 148, 149, 333, 526, 530, 776, 789.
——— v. Carr, 615.
——— v. King, 20.
Watts's case, 405, 454, 661.
Waully's case, 233.
Wavell's case, 370.
Weatherstone v. Hawkins, 540.
Weaver v. Bush, 213, 214.
——— v. Ward, 211.
Webb's case, 45, 123, 383, 384, 501, 579, 591.
Wedge's case, 712.
Weeks v. Sparks, 22.
Wegener's case, 530, 537.
Weld v. Hornby, 661.
Welbourne's case, 26.
Welland's case, 78.
Welling's case, 340.
Wells's case, 112.
Welsh's case, 184, 299.
West's case, 130, 555.
Westbeer's case, 49, 75, 503.
Westwood's case, 263.
Wetherell's case, 179, 670.
Wetton's case, 288.
Wharam v. Routledge, 11.
Wheatley's case, 293, 320.
Wheeler's case, 757.
Wheeling's case, 28.
Whiley's case, 58, 67, 69, 390.
White's case, 28, 30, 97, 335, 353, 526, 534, 657, 659, 660, 662, 675.
Whitehead's case, 66, 325.
Whiteley's case, 608, 651.
Whitelock v. Baker, 22.
——— v. Musgrave, 161.
Whitfield's case, 652.
Whithorne's case, 637.
Whiting's case, 106.
Whitnash v. George, 29.
Whitney's case, 287, 558.
Whittingham's case, 345.
Wicks's case, 394.
Wigg's case, 557, 600, 662.
Wightwick v. Banks, 156.
Wilcock's case, 414.
Wilcox's case, 382, 405.
Wild's case, 118.
Wilder's case, 292.
Wilkin's case, 493, 512.
Wilkinson's case, 471, 514.
Wilks's case, 386, 488, 525.
Williams's case, 105, 106, 219, 271, 286, 289, 340, 348, 418, 478, 653, 664, 665, 670.
Williams v. Mundie, 146.
——— v. Ogle, 81.
——— v. Stott, 301, 304, 340, 536.
Williamson's case, 561, 589, 591.
——— v. Henley, 543.
Willis's case, 476.
——— v. Bernard, 58.
Willoughby's case, 416, 645, 700.
Wilson's case, 44, 272, 299, 378.
——— v. Rastall, 144, 145.
——— v. Stubbs, 80.
Wiltshire v. Prince, 231.
Winkworth's case, 59.
Winship's case, 670.
Winter's case, 205.
Wiseman's case, 764.
Withal's case, 75, 282.
Witchell's case, 364.
Withers's case, 147, 652.
Witt's case, 273.
Wood's case, 223, 288, 293, 652, 673.
Wood v. Drury, 161.
——— v. Neal, 452.
Woodcock's case, 23, 25, 51, 117, 729.
Woodward's case, 86, 205, 208, 215, 335.

Wooldridge's case, 303, 397.
Woodyer v. Hadden, 452.
Worrel's case, 291, 444.
Wright's case, 34, 138, 451, 540, 779.
Wright v. ———, 137.
——— v. Littler, 24.
Wyat's case, 670.
Wyatt v. Gore, 148.
Wyld's case, 124.
Wymer's case, 516.
Wyndham's case, 187.
Wynne's case, 475.

Yates's case, 370, 507.
Yates v. Lance, 111.
Yewen's case, 140.
Young's case, 315, 329, 362, 363, 365, 370, 384, 736.
Yrisarri v. Clement, 529.

ERRATA.

Page 19, *for* Phelp's case, *read* Philps's case.
47, *for* Swalkin's case, *read* Swatkin's case.
97, *for* Omichund *v.* Baker, *read* Omichund *v.* Barker.
137, *for* Foulk's *v.* Chad, *read* Folkes *v.* Chad.
159, *for* Rambsbottam's case, *read* Ramsbottam's case.
426, first paragraph, *for* cases, *read* case.
580, *for* Saunders's cose, *read* Saunders's case.
668, *for* Brodripp's case, *read* Brodribb's case.

A DIGEST, &c.

The general rules of evidence are the same in criminal and in civil proceedings. "There is no difference as to the rules of evidence," says Abbott, J. "between criminal and civil cases; what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." *Watson's case*, 2 *Stark. N. P. C.* 155.

PRIMARY AND SECONDARY EVIDENCE.

Primary Evidence
- *Written instruments* . . . 2
- *Handwriting* 5
- *Negative evidence of Consent* . . 6
- *Exceptions* 7
  - *Evidence of persons acting in public capacity* . 7
  - *Admissions by Party* . . . 8

Secondary Evidence
- *When admissible in general* . . 9
- *Notice to produce in general* . . . 9
  - *Form of* 10
  - *To whom and when* . . . 10
  - *Consequences of* 11

Loss of Document 11

It is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given, for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. *Gilb. Ev.* 3. *Bull. N. P.* 293.

Primary evidence—written instruments.]—As a general rule, the contents of a written instrument can only be proved by the production of the instrument itself, parol evidence of them being of a secondary or inferior nature. But this rule is not without many exceptions. In general, whenever an instrument is entered into in writing, which is intended by the parties (testified by their signatures) to contain and to be the evidence of their consent or agreement, or whenever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, that instrument or document is regarded as the best evidence of the agreement or facts which it records; and unless it be in the possession of the opposite party, and notice has been given to him to produce it, or it be proved to be lost or destroyed, secondary evidence of its contents is not admissible. Thus where a man makes a will of lands, which must necessarily be in writing, both the devisor and the law intend that that writing shall be the evidence of the devisor's intentions, and therefore the will itself must be produced; neither an exemplification under the great seal, nor a probate, or other copy being primary evidence of the devise. *B. N. P.* 246. In the same manner where two parties enter into an agreement in writing, that writing is intended by them to be the evidence of their mutual consent, and is the only primary evidence of that consent. *Brewer v. Palmer*, 3 *Esp.* 213.

Again, in an indictment for setting fire to a house, in order to prove that the house was insured, the books of the insurance office were produced, in which there was an entry to that effect; but Lord Kenyon ruled, that as the policy was the best evidence, the prosecutors could not give any evidence from their books, it being inferior evidence, unless notice had been given to produce the policy. *Doran's case*, 1 *Esp.* 127.

Upon the same principle, the records and proceedings of Courts of Justice, existing in writing, are primary evidence of the facts there recorded. Thus where it was necessary to prove the day on which a cause came on to be tried, Lord Ellenborough said that he could not receive parol evidence of the day on which the court sat at Nisi Prius, as that was capable of other proof by matter of record. *Thomas v. Ansley*, 6 *Esp.* 80. *Vide post* "*Documentary Evidence.*" So on an indictment for disturbing a protestant congregation, Lord Kenyon ruled that the taking of the oaths under the Toleration Act being matter of record, could not be proved by parol evidence. *Hube's case*, *Peake*, 132. On an indictment on the statute 8 & 9 W. 3. c. 26. 81. for having coining instruments in possession (repealed and re-enacted by 2 W. 4. c. 34.) it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor was the warrant of com-

mitment or the depositions before the magistrate given in evidence to shew on what transactions, or for what offence, or at what time the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held that there was not sufficient evidence that the prisoners were apprehended upon transactions for high treason respecting the coin, within three months after the offence committed. *Phillips's case. Russ & Ry. C. C. R.* 369. So where the transactions of courts which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognizes. 3 *Stark. Ev.* 1043. 1*st Ed.*

Although matters of record and proceedings of courts of justice, when committed to writing, cannot be proved by parol, they may be proved by examined copies, a rule founded upon a principle of general convenience. In the same manner examined copies of *public* books are admissible without producing the originals. *Vide post.* But no such rule exists with regard to private documents, there being no inconvenience in requiring their production.

The admission of the party against whom the evidence is offered will not preclude the necessity of producing a written instrument where it is primary evidence. *Bloxam v. Elsie, Ry. & Moo.* 187. *Call v. Dunning,* 4 *East,* 53. *Cunliffe v. Sefton,* 2 *East,* 187, 188. Thus where to prove a discharge under the Insolvent Debtor's Act, the defendant proposed to give in evidence a verbal acknowledgment by the plaintiff himself, Lord Ellenborough said that this was insufficient, as the discharge might be irregular and void, and the plaintiff mistaken; that to prove a judicial act of this sort, it was necessary to call the clerk of the peace and give in evidence the order of the court of quarter sessions, by which the discharge was effected. *Scott v. Clare,* 3 *Camph.* 236.

But it is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced. Thus where a memorandum of agreement was drawn up, and read over to the defendant, and he assented to, but did not sign it, it was held that the terms mentioned in it might be proved by parol. *Doe v. Cartwright,* 3 *B. & A.* 326. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but is not signed by the vendor, it may be proved by parol. *Dalison v. Stark,* 4 *Esp.* 163. So facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took. *Rambert v. Cohen,* 4 *Esp.* 213. So where, in trover, to prove the demand, the witness stated that he

had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was unnecessary to produce the writing. *Smith v. Young*, 1 *Campb.* 439. So a person who takes notes of a conversation need not produce them in proving the conversation. Thus in *Layer's case* for high treason, Mr. Staney, an Under Secretary of State, gave evidence of the prisoner's confession before the council, though it had been taken down in writing. 12 *Vin. Ab.* 96. And although what is said by a prisoner whose examination is regularly taken under 7 G. 4. c. 64. s. 2. (*vide post*) cannot be proved by parol, yet it may be so proved where the written examination is inadmissible on account of an irregularity in the mode of taking it. *Reed's case, Moo. & Mal.* 403. So the fact of a marriage may be proved by a person who was present, and it will not be necessary to produce the parish register as the primary evidence. *Morris v. Miller*, 1 *W. Bl.* 632.

Where the question was, what were the inscriptions and devices on certain banners carried at a public meeting, on an indictment for unlawfully assembling, it was held that parol evidence of the inscriptions was admissible without producing the banners themselves; and *per Lord Tenterden*, "Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings." *Hunt's case*, 3 *B. & A.* 566.

In the case of *printed* documents, all the impressions are originals, or in the nature of duplicate originals, and any copy will be primary evidence. Thus where, in a prosecution for high treason, a copy of a placard was produced, by the person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's, and taken away twenty-five copies, it was objected that the original ought to be produced, or proved to be destroyed, or in the possession of the prisoner; but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies, and that being taken one out of a common impression, they must be supposed to agree in the contents. "If the placard," said Mr. Justice Bayley, "were offered in evidence to shew the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals; the manuscript is discharged, and since it appears that they are from the same press, they must be all the same." *Watson's case*, 2 *Stark.* 130.

The transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. Thus where, in a prosecution against Hunt for an unlawful assembly, in order to prove the

reading of certain resolutions, a witness produced a copy of the resolutions which had been delivered to him by Hunt as the resolutions intended to be proposed, and proved that the resolutions he heard read, corresponded with that copy, this was held sufficient, though it was objected that the original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. *Hunt's case*, 3 *B. & A.* 568. In a prosecution on the Irish Convention Act, the indictment averred that divers persons assembled together, and intending to procure the appointment of a committee of persons, entered into certain resolutions respecting such committee, and charged the defendant with certain acts done for the purpose of assisting in forming that committee, and carrying the resolutions into effect. To prove the first averment, a witness was called, who stated, that at a general meeting (the defendant not being present) the secretary of the meeting proposed a resolution and read it from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the majority of the court were of opinion that this was not a case to which the distinction between primary and secondary evidence was strictly applicable; that the proposed evidence was intended to shew, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. *Sheridan & Kirwan's case*, 31 *How. St. Tr.* 672.

Primary evidence—handwriting.] In proving handwriting the evidence of third persons is not inferior to that of the party himself. "Such evidence," says Mr. Phillipps, "is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means, as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true." 1 *Phill. Ev.* 212, 6th *ed.*

If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or not *genuine* being the same in both cases. *But see* 1 *Phill. Ev.* 213, 6th *ed.* Accordingly, although in an early case, where

it was requisite to prove that certain alterations in a receipt were forged, it was held that the party who had written the receipt ought to be called as the best and most satisfactory evidence, *Smith's case*, *O. B.* 1768, 2 *East*, *P. C.* 1000., yet in subsequent cases of prosecutions for forgery, it has been held that the handwriting may be disproved by any person acquainted with the genuine handwriting. *Hughes's case*, 2 *East*, *P. C.* 1002. *M'Guire's case*, *Id.*

In certain indictments for the then capital offence of putting away bank of England notes, knowing them to be forged, &c. the counsel for the bank thought it proper, over and above the usual proof given by the bank inspector of the note being forged, (viz. of its not being bank paper, nor a bank impression, and that he was acquainted with the handwriting of the clerk whose name appeared to the note, and that he believed it not to be his hand writing) to go further, and produce the clerk himself to prove that he never signed it. This appeared to be done upon some intimation that the jury would not be satisfied without the best proof the nature of the case would admit of, and *that* was the signing clerk himself, who was a competent witness. The following questions were submitted for the opinion of the judges. Is it necessary that the signing clerk, if living, should be produced? And if a jury should require his testimony, and it is not produced, what direction should the judge give? The judges were of opinion that it was unnecessary to produce the signing clerk to show that he never signed the notes, if established by the evidence of persons acquainted with his handwriting, that the signature was not in his handwriting. *Case of Bank prosecutions*, 1 *Moody*, *C. C.* 380.

Primary evidence—negative evidence of consent.] In certain prosecutions, it is necessary to prove that the act with which the prisoner is charged was done without the consent, or against the will, of some third person, and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time, it appears to have been thought necessary to call the party himself, it is now settled that his testimony is not the best evidence, but that the want of consent may be proved in other ways. In a prosecution under the statute 42 G. 3. c. 107. s. 1. (repealed by 7 & 8 G. 4. c. 27.) where it was necessary to prove that the act in question was done without the consent of the owner of the property, *Lawrence*, *J.* held that it was necessary on the part of the prosecution, to call the owner for the purpose of proving that he had not given his consent to the prisoner. *Rogers' case*, 2 *Campb.* 654. But where on an indictment under 6 G. 3. c. 36. (repealed by 7 & 8 G. 4. c. 27. and re-enacted by c. 30.) for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave

any consent, and from all he had heard his master say, (who had died before the trial, having given orders for apprehending the prisoners on suspicion) he believed that he never did. Bayley J. left it to the jury to say whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoner's running away when detected, as evidence to show that the consent required had not in fact been given. The prisoners were found guilty. *Hazy's case*, 2 *C. & P.* 458. So on an indictment on 42 *G.* 3. c. 107. s. 1. for killing fallow deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, Gaselee, J. was of opinion that the offence was committed under such circumstances as to warrant the jury in finding non-consent; but *Rogers's case* (*ante*) having been cited, further evidence was gone into by calling the persons engaged in the management of the different properties, but not the owners. The judges having considered these cases, held the convictions right. *Allen's case*, 1 *Moo. C. C.* 154.

Primary evidence—exceptions—persons acting in a public capacity.] Where persons, acting in a public capacity have been appointed by instruments in writing, those instruments are not considered the primary evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters without producing their appointments,' and this even in the case of murder. *Per Buller, J., Berryman v. Wise*, 4 *T. R.* 366. *Gordon's case*, 1789, *cited, Ib.* So, where on an indictment for perjury, in an answer to an allegation in the Ecclesiastical Court, in order to prove that the person by whom the oath was administered, was a surrogate, evidence was given of his having been in the habit of acting in that capacity, *Lord Ellenborough* said, "I think the fact of his having acted as surrogate is sufficient *primâ facie* evidence that he was duly appointed, and had competent authority to administer the oath. I cannot, for this purpose, make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do." *Verelst's case*, 3 *Campb.* 432. So where an affidavit purported to be sworn before a commissioner, proof of his acting as such was held by Patteson, J. to be sufficient. *Howard's case*, 1 *Moo. & Rob.* 187. In an action on an attorney's bill, it was proved by the defendant that the plaintiff was admitted an attorney of the King's Bench in 1792, and had ceased for more than one year to take out his certificate; it was contended that it lay upon him to prove his re-admission, but as he had

proved that he had acted as an attorney of the Common Pleas in 1824, it was held that it was to be presumed he had lawfully acted in that character, in that court, till the contrary was proved. *Pearce v. Whale*, 5 *B. & C.* 38.

Primary evidence — exceptions — admissions by the party.] Although, as already stated (*ante, p.* 3.), the contents of a written instrument cannot be proved against a party by his admission, yet where he is charged as bearing some particular character, the fact of his having acted in that character will be sufficient evidence, as an admission without reference to his appointment being in writing. Thus in an action for penalties against a collector of taxes, under 43 G. 3. c. 99. s. 12. the warrant of appointment was not produced, but it was held that the act of collecting the taxes was sufficient to prove him to be collector. *Lister v. Priestly, Wightw.* 67. So on an information against an officer for receiving pay from government for a greater number of men than had mustered in his corps, Lord Ellenborough held that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant of the corps, without adducing direct evidence of his appointment by the king. *Gardner's case*, 2 *Campb.* 513. So in an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, will be evidence that he is parson, without formal proof of his title. *Bevan v. Williams*, 3 *T. R.* 635. (*a.*) *Smith v. Taylor*, 1 *Bos. & Pul. N. R.* 210. Again, upon an indictment for embezzlement under 2 W. 4. c. 4. against a letter carrier, proof that he acted as such was held to be sufficient, without showing his appointment. *Barrett's case*, 6 *C. & P.* 124.

In the same manner, where the appointment or particular character of the other party is to be proved, the admission of the party against whom the evidence is offered, will not be secondary evidence, although the appointment be in writing. Thus in an action for penalties on the Post Horse Act, brought by the farmer of the tax, it was held not to be necessary for the plaintiff to give in evidence his appointment by the Lords of the Treasury or the Commissioners of the stamp duties; proof that the defendant had accounted with him as farmer of the duties, being sufficient. *Radford v. M'Intosh*, 3 *T. R.* 632. *See Smith v. Taylor*, 1 *Bos. & Pul. N. R.* 211. So in an action for slandering the plaintiff in his profession of an attorney, the words being "that the defendant would have him struck off the roll," &c. it was held that this was an admission by the defendant, that the plaintiff was an attorney, and sufficient evidence of that fact. *Berryman v. Wise*, 4 *T. R.* 366. The rule is thus stated by *Heath, J.* in *Smith v. Taylor*, 1 *Bos. & Pul. N. R.* 208. "Where a de-

fendant, in the course of the transaction on which the action is founded, has admitted the title by virtue of which the plaintiff sues, it amounts to *primâ facie* evidence that the plaintiff is entitled to sue."

Secondary evidence—when admissible in general.] Secondary evidence is admissible, where the primary evidence, being documentary, is either lost or destroyed, or where it is in the hands of the opposite party, or of his privy or agent; or in the hands of a person privileged from producing it, and who being required to do so, insists upon his privilege, (*see Marston v. Downes*, 6 *C. & P.* 381); or where, in certain cases, as in the case of tablets let into walls, it is impossible to produce the original in court, without great inconvenience. In these instances, under certain regulations, and subject to certain preliminary steps, secondary evidence is admissible.

Secondary evidence—notice to produce—in general.] Where a document is in the hands of the other party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. There is no distinction between civil and criminal cases, with regard to the production of documents after notice given to produce them, and with regard to the admissibility of secondary evidence in case of their non-production. *Le Merchand's case, coram Eyre, B.* 1 *Leach*, 300 (*n*). In Layer's case for high treason, it was proved by a witness, that the prisoner had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it in his pocket; and no objection was made to the witness giving parol evidence of the paper. 6 *State Trials*, 229. (*fo. Ed.*)

A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner, under such circumstances as that it might be presumed to have come to his own hands. Col. Gordon was indicted for the murder of Lieut.-Col. Thomas in a duel. The letter from Gordon containing the challenge was carried by Gordon's servant, and delivered to Thomas's servant, who brought a letter in answer, and delivered it to Gordon's servant; but it did not appear in fact, that the letter was ever delivered to Gordon himself. Mr. Baron Eyre permitted an attested copy of the latter letter to be read against the prisoner, and left it to the jury as legal evidence, if they were of opinion that the original had ever reached the prisoner's hands. Hotham, B. concurred, but Gould, J. thought that positive evidence ought to be given that the original had come to the prisoner's hands. *Gordon's case, O. B.* 1784. 1 *Leach*, 300. (*n.*)

Secondary evidence — notice to produce — when dispensed with.] Where from the nature of the prosecution the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary. Thus upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given, without any proof of a notice to produce. *Arckles's case*, 1 *Leach*, 294. 2 *East*, *P. C.* 675. So upon an indictment for forging a note, which the prisoner afterwards obtained possession of and swallowed, Buller, J. permitted parol evidence of the contents of the note to be given without any notice to produce. *Spragge's case, cited* 14 *East*, 276. In the case of De la Motte, indicted for high treason, his correspondence was secretly opened, copies of the contents taken, and the originals sealed again, and forwarded to the place of destination. The original letters having been proved to be written by the prisoner, the copies proved to be examined were admitted in evidence. *De la Motte's case*, 1 *East*, *P. C.* 124. So upon the trial of an indictment for administering an unlawful oath, it may be proved by parol that the prisoner read the oath from a paper, although no notice to produce that paper has been given. *Moors' case*, 6 *East*. 419. (*a*). *Hunt's case*, 8 *B. & A.* 568, *ante*, *p.* 4.

It is not sufficient to dispense with notice to produce, that the party in possession of the document has it with him in court. *Bate v. Kinsey*, 1 *M. & R.* 38.

Secondary evidence—notice to produce—form of.] It is not necessary that a notice to produce should be in writing, and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone. *Smith v. Young*, 1 *Campb.* 440. 2 *Russell*, 677. The notice, if a written one, must be properly entitled. *Harvey v. Morgan*, 2 *Stark.* 17.

In order to render it effective the notice should sufficiently point out the document required to be produced. Where, upon a notice to produce "all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration," the party served was called upon to produce a particular letter, Best, C. J. was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required. *France v. Lucy*, *Ry. & Moo. N. P. C.* 341. *see also Jones v. Edwards*, *M'Cl. & Y.* 139.

Secondary evidence—notice to produce—to whom and when.] In criminal as well as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. *Cates, q. t. v. Winter*, 3 *T. R.* 306. *M'Nally on Ev.* 355. 2 *T. R.* 203. 2 *Russell*, 678. It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each

particular case. The prisoner was indicted for arson. The commission day was the 15th March, and the trial came on on the 20th. Notice to produce a policy of insurance was served on the prisoner in gaol on the 18th March. His residence was ten miles from the assize town. It being objected that this notice was too late, Littledale, J. after consulting Parke, J. said. "We are of opinion that the notice was too late. It cannot be presumed that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think, that secondary evidence of the policy cannot be received." *Ellicombe's case*, 5 *C. & P.* 522, 1 *Moody & Rob.* 260. *S. C.* The notice should be served before the commission-day, when the party does not live at the assize town. 1 *Moo. & Rob.* 259.

Secondary evidence—consequences of notice to produce.] The only consequence of giving a notice to produce, is that it entitles the party giving it, after proof that the document in question is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, and does not authorise any inference against the party failing to produce it. *Cooper v. Gibbons*, 3 *Camph.* 363. If the party who calls for the papers inspects them, this will render them evidence for the opposite party. *Wharam v. Routledge*, 5 *Esp.* 235. Though it is otherwise if he merely calls for them without inspecting them. *Sayer v. Kitchen*, 1 *Esp.* 210.

As against a party who refuses, upon notice, to produce a document, it will be presumed that it bore the requisite stamp, but the party refusing is at liberty to prove the contrary. *Crisp v. Anderson*, 1 *Stark.* 35.

Secondary evidence—loss of document.] Where the original of a document is proved to be lost or destroyed, secondary evidence of its contents may be given in criminal as well as in civil proceedings. Thus upon an indictment for false pretences contained in a letter, upon proof of the loss of the letter, parol evidence of its contents is admissible. *Chadwick's case*, 6 *C. & P.* 181. Before secondary evidence can be given of any document, evidence of its loss must be offered, and it must be shown that due diligence has been exercised in searching for it. The degree of diligence will necessarily depend on the particular case. Where, on the prosecution for a libel, the publisher of a paper in which the libel had been inserted, stated that he believed the original was either destroyed or lost, having been thrown aside as useless; this was held sufficient to let in secondary evidence. *Johnson's case*, 7 *East*, 66.

The degree of diligence to be exercised in searching for a document, will depend in a great measure on the importance of the document. *Gully v. Bp. of Exeter*, 4 *Bingh.* 298. In the

case of an useless document, the presumption is that it has been destroyed. *Per Bayley, J. The King v. East Farleigh*, 6 *D. & R.* 153. And where the loss or destruction of a paper may almost be presumed, very slight evidence of such loss or destruction is sufficient. *Per Abbott, C. J. Brewster v. Sewell*, 3 *B. & A.* 296. Thus where depositions have been delivered to the clerk of the peace or his deputy, and it appears that the practice is, on a bill being thrown out, to put away the depositions as useless, slight evidence of a search for them is sufficient, and the deputy need not be called, it being his duty to deliver the depositions to his principal. *Freeman v. Arkell*, 2 *B. & C.* 496.

Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is, that it is lost or destroyed. *The King v. Stourbridge*, 8 *B. & C.* 96, 2 *M. & R.* 43. *S. C.*

PRESUMPTIONS.

General nature of Presumptive Evidence and when admissible 12
General instances of 13
Of Innocence and Legality 14
Of Guilt arising from the conduct of the Party charged 15
Arising from the possession of stolen Property . 16
Of Malice 18
Of Intent to defraud 19
Of the duration of Life 19

General nature of presumptive evidence—and when admissible.] When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and these are called *presumptions* and not *proofs*, for they stand instead of the proofs of the fact till the contrary be proved. *Gilb. Ev.* 157. The instance selected by Chief Baron Gilbert to illustrate the nature of presumptions is, where a man is discovered suddenly dead in a room, and another is found running out in haste with a bloody sword; this is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such facts;

and the next proof to the sight of the fact itself is, the proof of those circumstances that usually attend such fact. *Id.*

"The principal difference," observes an eminent writer on the law of evidence, (1 *Phill. Ev.* 155.) "to be remarked between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter case, which affects life and liberty." The same doctrine is asserted by Mr. M'Nally, in his *Rules of Evidence on Pleas of the Crown*, p. 578. "Every thing," he observes, "is a doubt in a civil case, where the jury weigh the evidence, and having struck a fair balance, decide according to the weight of the evidence. This, however, is not the rule in criminal cases, for it is an established maxim, that the jury are not to *weigh* the evidence, but in cases of doubt to acquit the prisoner." The soundness of this distinction may, perhaps, be doubted. The rules adopted with regard to the admission of presumptions in civil cases, are grounded on the principle that they tend to the discovery of the truth, and the consequences which are to ensue upon that discovery seem to have no bearing upon the application of the rule. Great caution is, doubtless, necessary in all cases of presumptive evidence, and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods *of a certain person unknown*, merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead." 2 *Hale*, 290. So it is said by Sir William Blackstone, 4 *Comm.* 358, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. The following case on this subject was cited by Garrow, *arguendo*, in *Hindmarsh's case*, 2 *Leach*, 571. The mother and reputed father of a bastard child, were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child, observed, that it was possible the tide might have carried out the *living* infant, and the prisoners were acquitted.

General instances of presumption.] As almost every fact is capable of being proved by presumptive as well as by positive evidence, it would be impossible to enumerate the various cases in which the former evidence has been admitted. It may be

useful, however, to state some particular instances of presumptive proof which may occur in the course of criminal proceedings.

Proof of the possession of land, or the receipt of rent, is *primâ facie* evidence of seisin in fee. *Co. Litt.* 15. *a. B. N. P.* 103. So possession is presumptive evidence of property in chattels. A deed or other writing thirty years old is presumed to have been duly executed, provided some account be given of the place where found, &c. *B. N. P.* 255. The licence of a lord to enclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognizant of it. *Doe v. Wilson*, 11 *East*, 56. The flowing of the tide is presumptive evidence of a public navigable river, the weight of such evidence depending upon the nature and situation of the channel. *Miles v. Rose*, 5 *Taunt.* 705, 1 *Marsh.* 313. *S. C. R. v. Montague*, 4 *B. & C.* 602. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. *Jolliffe's case*, 2 *B. & C.* 54, 3 *D. & R.* 240. *S. C.*

The law with regard to the presumption which length of time affords in the case of the possession of property of various kinds, is now regulated by the statute 2 & 3 Will. 4. c. 71.

Presumption of innocence and legality.] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption. Where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. *R. v. Inhab. of Twyning*, 2 *B. & A.* 386. It is a rule that illegality is never to be presumed, but the presumption is that a party complies with the law. *Sissons v. Dixon*, 5 *B. & C.* 758. Thus legitimacy is always presumed. *Banbury Peerage case*, 2 *Selw. N. P.* 709. So where a letter is sent with a parcel of goods, it will be presumed to relate to the goods, so as to come within the proviso of 43 Geo. 3. c. 81. *Bennet v. Clough*, 1 *B. & A.* 461.

Upon the same principle it will be presumed, where persons act in a public capacity, that they have been regularly appointed. Thus the fact of a person acting in the character of a surrogate is *primâ facie* evidence that he was duly appointed, and had competent authority. *Verelst's case*, 3 *Campb.* 432. *ante, p.* 7. So where a person acts as a special commissioner, for taking affidavits. *Howard's case*, 1 *Moody & Rob.* 187. *Ante, p.* 7. So where a person acts as a peace officer, justice of the peace, &c., it is a general presumption of law that he is duly authorised to do so. *Per Buller, J., Berryman v. Wise*, 4 *T. R.* 366. *Ante, p.* 8. And on an indictment for the murder of a constable in the execution of his

duty, it has been held not to be necessary to produce his appointment, it being sufficient if he was known to act as constable. *Gordon's case*, 1 *Leach*, 515., 1 *East*, *P. C.* 352. *S. C. ante*, *p.* 7.

Of guilt—arising from the conduct of the party charged, at the time of or after the charge.] In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party at the time of, or after being charged with the offence. Thus it is frequently proved that upon being charged he fled, or endeavoured to make his escape. Upon this proof it is said by Smith, B. that he had the authority of the law to say, that though a man charged with an offence should fly, that it is not conclusive evidence of guilt. The jury could not forget that one of the oaths they had taken was, whether the prisoner had fled in consequence of the charge made on him; but though it should be established that he fled in consequence of the charge, yet it did not follow of necessity that he was guilty of the murder; though it was a circumstance materially unfavourable and suspicious. *Crawley's case*, 40 Geo. 3. *M'Nally on Ev.* 577. The introduction of a falsehood into the defence is also a presumption against a prisoner. This presumption is heightened if the falsehood is to be supported, as it almost necessarily must be, by a witness conscious of it. *Clarke's case*, *Bury Spring assizes*, 1789, *Gilb. Ev. by Loft*, 898. *M'Nally on Ev.* 580. No presumption of guilt arises from the silence of a prisoner when, on his examination before a magistrate, he is charged by another prisoner with having been joined in the commission of the offence. *Appleby's case*, 3 *Stark.* 33. *Vide post.*

In weighing the effect of the presumptive evidence furnished by the conduct of a person charged with the criminal offence, great caution should be exercised. An innocent man finding himself in a situation of difficulty, and perhaps from the circumstances of the case, of danger, is sometimes induced to adopt a line of conduct which bears with it a presumption of guilt. A strong instance of this is to be found in *Hale*, 2 *P. C.* 290. (*n.*) The case was thus; An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, *Good uncle, do not kill me!* after which she could not be found. The uncle was committed on suspicion of having murdered her, and was admonished by the judge of assize, to find out the child by the next assizes. Being unable to discover his niece, he brought another child, dressed like his niece, and resembling her in person and years; but, on examination, the fraud was detected, and upon the presumption of guilt which these circumstances afforded, he was found guilty and executed. The child afterwards re-appeared, when of age, to claim her land. On being

beaten by her uncle, she had run away, and had been received by a stranger.

Various other instances of the presumption of guilt arising from the conduct of the party before the charge, will be found in the following pages.

Presumption of guilt arising from the possession of stolen property, &c.] The most common case of presumptive evidence in criminal proceedings, is the presumption arising from the possession of stolen property. The rules on this subject are well stated by Mr. East. It may be laid down generally, he says, that whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as the length of time which has elapsed between the loss of the property, and the finding it again; either as it may furnish more or less doubt of the identity of it, or as it may have changed hands oftener in the meantime, or it may have increased the difficulty to the prisoner of accounting how he came by it; in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot, from whence the property is supposed to have been taken, at the time; as well as his conduct during the whole transaction, both before and after the recovery, are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another had lost, unless that other can, from marks or circumstances, satisfy the court and jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though where the fact is very recent, so as to afford a reasonable presumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus, a man being found coming out of another's barn, and upon search, corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharfs, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must be understood of articles like those above mentioned, the identity of which is not capable of strict

proof from the nature of them. 2 *East, P. C.* 656. The fact of concealment (the identity of the property not being proved) is not of itself evidence of stealing, though undoubtedly very strong corroborative proof of it. *Id.* 657. 3 *Inst.* 98.

Where stolen property was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley J. held that the prisoner could not be called on to account for the manner in which it came into his possession. *Anon.* 2 *C. & P.* 459. Where seventy sheep were stolen on Thorley common, on the 18th June, but were not missed till November, and the prisoner was in possession of four of the sheep, in October, and of nineteen others on the 23d November, Bayley J. allowed evidence of the possession of both to be given. *Dewhurst's case*, 2 *Stark. Ev.* 449. (*n.*) 2*d ed.*

Cases frequently arise of the discovery of property recently after its being stolen, in the house of a particular person, but the weight of this evidence must depend upon the accompanying circumstances of the case. It is to be carefully observed, says Mr. Starkie, that the mere finding of stolen goods in the house of the prisoner, where there are other inmates capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner. 2 *Stark. Ev.* 450, (*n.*) 2*d ed.*

In order to render evidence of the possession of stolen property admissible, it is not necessary that the discovery should take place before the apprehension of the prisoner. In *Watson's case*, 2 *Stark.* 139, Lord Ellenborough cited a case from recollection, where a butler to a banker had been taken up on suspicion of having committed a great robbery. The prisoner had been seen near the privy, and the circumstance having excited suspicion in the minds of the counsel, who considered the case during the York assizes, at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted. He had been separated from the custody of the plate since he had been confined in York Castle for some time, but no doubt was entertained as to the admissibility of the evidence; and Abbott, J. observed that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension.

The possession of stolen property is sometimes used, not as presumptive evidence of the fact of larceny, but as proof of the commission of another offence. Thus on a charge of arson, the evidence of the prisoners' having been present and implicated in the fact was, that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them; Buller, J. doubted at first whether such evidence of another felony could

be admitted in support of this charge, but as it seemed to be all one act, he admitted it. *Rickman's case*, 2 *East*, *P. C.* 1035.

Where two prisoners were jointly indicted for stealing two horses, the property of different persons, and it appeared that the original larceny was in Somersetshire, on different days, and in different places, but the prisoners were found in joint possession of them in Wilts, where they were indicted; on an objection that the prosecutor must elect upon which of the felonies to proceed, Littledale, J. said, "If you could confine your evidence entirely to a single felony in this county, you need not elect; but this you cannot do, for you must prove that the horses were originally stolen in another county. The possession of stolen property, soon after a robbery, is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking with all its circumstances." *Smith's case*, *Ry. & Moo. N. P. C.* 295.

In the application of the evidence respecting the possession of stolen property great caution is necessary. "If a horse be stolen from A." says Lord Hale, "and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance B. was condemned and executed at Oxford assizes; and yet within two assizes after, C. being apprehended for another robbery, upon his judgment and execution confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped, and B. was apprehended with the horse, and died innocently." 2 *Hale*, *P. C.* 289. The following remarks by Mr. East on this subject are well deserving of attention. "It has been stated before, that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given; little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption, and therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession." 2 *East*, *P. C.* 665.

Presumption of malice, &c.] Where a man commits an unlawful act, unaccompanied by any circumstances justifying the commission of it, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued. *See Dixon's case*, 3 *M. & S.* 15. Thus a pre-

sumption of malice arises in many cases. In every charge of murder, says Mr. Justice Foster, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumes the fact to be founded in malice, until the contrary appears. *Foster*, 255. 1 *Hale, P. C.* 455. 1 *East, P. C.* 340. Where a man was convicted of setting fire to a mill, with intent to injure the occupiers thereof, a doubt occurred whether, under the words of 43 G. 3. c. 58. an intent to injure or defraud some person was not necessary to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that a person who does an act wilfully, necessarily intends that which must be the consequence of the act, viz. injury to the owner of the mill burned. *Farrington's case, Russ. & Ry.* 207. *See also Phelp's case*, 1 *Moody, C. C.* 263.

Presumption of intent to defraud.] An intent to defraud may be presumed where the effect of the act committed by the party is to defraud another party. Thus where a person was indicted for disposing of a forged bank note, with intent to defraud the Bank of England, and the jury found that the intention of the prisoner was to defraud whoever might take the note, and that the intention of defrauding the bank in particular did not enter into his contemplation, a question was submitted to the judges, whether an intention to defraud the bank ought to be inferred, where that intention was not likely to exist in the prisoner's mind, and where the caution ordinarily used would naturally protect the bank from being defrauded? Their Lordships were of opinion, that the prisoner, upon the evidence in this case, must be taken to have intended to defraud the bank, and consequently that the conviction was right. *Mazagora's case, Russ. & Ry.* 291. And even where the prosecutor, on an indictment for forging a receipt with intent to defraud him, swore that he believed the prisoner had no such intent, the judge told the jury that the defrauding being the necessary effect and consequence of the forgery, it was sufficient evidence of the intent of the prisoner for them to convict him; and he was convicted accordingly. The twelve judges held the conviction to be right. *Sheppard's case, Russ. and Ry.* 169. *See also Phelp's case*, 1 *Moody, C. C.* 263.

Presumption of the duration of life.] In analogy to the statute respecting bigamy, (*vide post* "Bigamy,") at the expiration of seven years from the period when a person was last heard of, he will be presumed to be dead, *Doe v. Jesson*, 6 *East*, 84, *Doe v. Deakin*, 4 *B. & A.* 433; and with the addition of other circumstances, the presumption may arise at an earlier period.

Thus evidence that a person sailed in a ship bound for the West Indies, two or three years ago, and that the ship has not been since heard of, is presumptive evidence of the death of the party; but the time of his death, if material, must depend upon the particular circumstances of the case. *Watson v. King*, 1 *Stark.* 121. The fact of the party being dead or alive at any particular period within or at the end of the seven years, must be proved by the party asserting that fact. *Doe v. Nepean*, 5 *B, & Ad.* 86.

HEARSAY.

General Nature of hearsay Evidence . . 20
Hearsay admissible
As part of the Res Gestæ . . . 20
On Questions of Pedigree . . . 22
On Questions of Public Right . . . 22
Of Persons having no interest to misrepresent . 23
Dying Declarations in general . . . 23
Admissible only in cases of Homicide . . 24
The party must be aware of his situation . 25
When reduced into writing . . . 27
Evidence in Answer to proof of . . 27

General nature of hearsay evidence.] Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. 1st, that the party originally stating the facts does not make the statement under the sanction of an oath; and 2dly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. Where, however, the peculiar circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible, as in the following instances.

Hearsay admissible as part of the res gestæ.] Where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was *said*, by *both* parties, during the continuance of the transaction is admissible, for to exclude this would be to exclude the most important and unex-

ceptionable evidence. In this case, it is not the relation of third persons unconnected with the fact, which is received, but the declarations of the parties to the fact themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner, may be received in evidence as part of the transaction. *Lord G. Gordon's case*, 21 *How. St. Tr.* 535. So in a prosecution for a rape, the fact of a woman having made a complaint soon after the assault took place, is evidence; but it was ruled by Holroyd, J. that the *particulars* of her complaint would not be given in evidence. *Clarke's case*, 2 *Stark. N. P. C.* 242. By the laws of Scotland, the particulars of such declarations, when made *de recenti*, are allowed to be given in evidence. Thus in a case of rape, followed by cutting and stabbing, the account which the woman gave when she returned home, all bleeding, the following morning, of the way in which she had been used by the prisoner, was allowed to be fully laid before the jury, though she had just before been examined herself. *M'Cartney's case*, 1828, *Alison, Prac. Crim. Law of Scotl.* 514. And in another case of rape, the account which the woman gave to several witnesses the next day, was laid without reserve before the jury. *M'Kenzie's case, Id.* But this privilege is extended to those accounts only which are connected more or less directly with the *res gestæ* of the inquiry, or which were so recently given after it, as to form in some sort a sequel to the actual violence. *Id.* 515. On an indictment for an assault on a child with intent to ravish, the fact of her having complained of the injury recently after it was received, is confirmatory evidence. *Brazier's case*, 1 *East, P. C.* 444. Again, in actions of assault, what a man has said of himself to his surgeon, is admissible to show what he has suffered by the assault. *Per Lawrence, J. Avison v. Kinnaird*, 6 *East*, 198. So where a man was killed in consequence of having been run over by a cabriolet; on an indictment against the driver for manslaughter, it was held that what the man said immediately after receiving the injury, was admissible in evidence. *Foster's case, O. B.*, 6 *C. & P.* 325. So inquiries from medical men, with the answers to them, are evidence of the state of health of the patients at the time, and the symptoms and conduct of the parties themselves at the time, are always received in evidence upon such injuries, and must be resorted to from the very nature of the thing. *Per Lord Ellenborough, Avison v. Kinnaird*, 6 *East*, 195.

The following instances of hearsay, admissible as part of the *res gestæ* are mentioned by Mr. Phillipps. If it be material to inquire whether a certain person gave a particular order on a certain subject, what he has said or written, may be evidence

of the order; (*see Jenkins's case, Lewin, C. C.* 114); or where it is material to inquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written, may as clearly show his knowledge, as what he has done. Where it is relevant and material to inquire into the conduct of rioters, what has been said by any of the party in the act of rioting, must manifestly be admissible in evidence, as showing their design and intention. On a charge of larceny, where the proof against the prisoner is that the stolen property was found in his possession, it would be competent to show on behalf of the prisoner, that a third person left the property in his care, saying that he would call for it again afterwards; for it is material in such a case, to inquire under what circumstances the prisoner first had possession of the property. 1 *Phill. Ev.* 223.

Hearsay admissible on questions of pedigree.] The written or verbal declarations of deceased members of a family, are admissible on questions of pedigree. Declarations in a family, descriptions in a will, inscriptions upon monuments, in Bibles and registry books, are all admitted upon the principle that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth. *Per Lord Eldon, Whitelocke v. Baker,* 13 *Ves.* 514. The declarations must be from persons connected by family or marriage with the person to whom they relate, and therefore what has been said by servants and intimate acquaintances, is not admissible. *Johnson v. Lawson,* 2 *Bingh.* 86, 9 *B. Moore* 183, *S. C.* If the declarations have been made after a controversy arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage case,* 4 *Campb.* 415. *Rosc. Dig. Ev. N. P.* 21.

Hearsay admissible on questions of public right.] On questions of public right, as a manorial custom (*Denn v. Spray,* 1 *T. R.* 466,) the boundaries between parishes and manors, (*Nicholls v. Parker,* 14 *East,* 331); hearsay or public reputation is admissible. But reputation is not evidence of a particular fact. *Weeks v. Sparke,* 1 *M. & S.* 687. Declarations of this kind are not evidence *post litem motam. Cotton's case,* 3 *Campb.* 444. Declarations of old persons, concerning the boundaries of parishes, have been received in evidence, though they were parishioners and claimed rights of common on the waste, which the declarations had a tendency to enlarge. *Nicholls v. Parker* 14 *East,* 331. *Plaxton v. Dare,* 10 *B. & C.* 19. Where the question is whether certain lands are in th parish of A or B., ancient leases in which they are described as lying in parish B. are evidence of reputation that the lands

are in that parish. *Plaxton v. Dare*, 10 *B. & C.* 17; *and see Brett v. Beales, M. & M.* 416.

Hearsay admissible of persons having no interest to misrepresent, or speaking against their own interest.] Where a person having no interest to misrepresent, in the course of his employment makes a declaration, such declaration has in certain cases been admitted in evidence; as where an attorney's clerk indorsed a memorandum of delivery on his master's bill, this after his death, was held to be evidence of the delivery. *Champneys v. Peek*, 1 *Stark.* 404. *See also Furness v. Cope*, 5 *Bingh.* 114, *Chambers v. Bernasconi*, 1 *C. M. & R.* 347.

So the declarations of deceased persons made against their own interest are admissible, as where a man charges himself with the receipt of money, it is evidence to prove the payment. *Goss v. Watlington*, 3 *B. & B.* 132. *Whitnash v. George*, 8 *B. & C.* 556. So a statement by a deceased occupier of land, that he rented it under a certain person, is evidence of such person's seisin. *Uncle v. Watson*, 4 *Taunt.* 16. In all these cases it must appear that the effect of the declaration is to charge the party making it. *Calvert v. Archbishop of Cant.* 2 *Esp.* 646.

Dying declarations—in general.] Analogous to the cases in which hearsay evidence is admissible, as being part of the *res gestæ*, are the cases of dying declarations. Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens, that there is no third person present to be an eye witness to the fact, and the usual witness in other felonies, viz. the party injured himself, is got rid of. 1 *East, P. C.* 353. But it is said by Eyre, C. B. that the general principle upon which evidence of this kind is admitted, is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. *Woodcock's case*, 1 *Leach*, 502.

Where the deceased, whose declarations are offered in evidence as to the cause of death, has been *particeps criminis*, (as a woman who has been killed by attempting to procure abortion), they are, nevertheless, as it seems, admissible against the other party. In *Tinckler's case*, 1 *East*, 354, where such evidence was received, the judges, on an objection to it, answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown; and though the practice be not to convict on

such proof uncorroborated, yet the evidence is admissible. The dying declarations of a convicted felon have been rejected, on the ground, that as, if alive, his evidence could not have been received, so after his death his dying declarations are inadmissible. *Drummond's case*, 1 *Leach*, 337, 1 *East*, *P. C.* 353. It should be observed, that the declarations in this case were also objectionable, as having no relation to a question of homicide, but being merely a confession that the party had committed a robbery, for which another person was indicted.

Dying declarations—admissible only in cases of homicide, where the circumstances of the death are the subject of the declaration.] It is a general rule that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations. *Per Abbott*, *C. J. Mead's case*, 2 *B. & C.* 600. Therefore, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, and evidence of the woman's dying declarations was tendered, Bayley, J. rejected it, observing, that although the declarations might relate to the cause of the death, still such declarations were admissible in those cases only, where the death of the party was the subject of inquiry. *Hutchinson's case*, 2 *B. & C.* 608. (*n.*) A man having been convicted of perjury, a rule for a new trial was obtained, pending which, the defendant shot the prosecutor, who died. On showing cause against the rule, an affidavit was tendered of the dying declarations of the prosecutor, as to the transaction, out of which, the prosecution for perjury arose; but the court were of opinion that this affidavit could not be read. *Mead's case*, 2 *B. & C.* 605, 4 *D. & R.* 120. *S. C.* So evidence of the dying declarations of the party robbed, has been frequently rejected on indictments for robbery. *Lloyd's case*, 4 *C. & P.* 233, *also by Mr. Justice Bayley, on the Northern Spring Circuit*, 1822, *and by Mr. Justice Best, on the Midland Spring circuit*, 1822. 1 *Phill. Ev.* 225. (*n.*)

In one or two civil cases, an exception has been made to this rule. Thus, Heath, J. admitted the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of Heaven for having been concerned in forging the instrument. *Vide* 6 *East*, 195. So in *Wright v. Littler*, 3 *Burr.* 1244, evidence of a dying confession of a witness to a bond was admitted. *See Mead's case*, 2 *B. & C.* 608. But it has been held in an action of ejectment, that the dying declarations of a person on a question of pedigree (the deceased not being a relation, or in any manner connected with the parties) cannot be received in evidence. *Doe v. Ridgeway*, 4 *B. & A.* 53.

Dying declarations admissible—the party must be aware of his situation.] Dying declarations are only admissible where the party making them, knows or thinks that he is in a dying state. Positive evidence of this knowledge is not required; but it may be inferred from the general conduct and deportment of the party. Nor is it necessary to prove expressions of apprehension of *immediate* danger, if it be clear that the party does not expect to survive the injury. *Bonner's case*, 6 *C. & P.* 386. Where a woman who had been dreadfully wounded, and who afterwards died of the wounds, made a declaration, the question was, whether it was made under the impression that she was dying. The surgeon said that she did not appear to be at all sensible of the danger of her situation, dreadful as it seemed to all around her, but lay quietly submitting to her fate, without explaining whether she thought herself likely to live or die. Eyre, C. B. was of opinion that inasmuch as she was mortally wounded, and was in a condition which rendered immediate death almost inevitable, as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation, her declarations made under these circumstances were to be considered by the jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. *Woodcock's case*, 1 *Leach*, 503. Again, in another case it was held by all the judges, that if a dying person either declares that he knows his danger, or it is reasonably to be inferred from his wound or state of illness, that he is sensible of his danger, his declarations are good evidence. *Johns's case*, 1 *East, P. C*, 357, 1 *Leach*, 504, (*n.*) *S. C.* The prisoner was tried for the rape and murder of a young girl of sixteen. The deceased lived only a few days after the perpetration of the offence, the particulars of which she communicated to her aunt, but did not intimate that she considered herself in a dying condition, or that she had any apprehension of immediate death. It appeared, however, that previous to making this declaration, she had confessed, had been absolved, and had received extreme unction from a priest, and that these are considered the last rites administered in the Catholic Church, and are esteemed sacraments by its disciples. Lord Kilwarden, C. J. with the concurrence of Kelly, J. admitted these declarations in evidence. *Minton's case*, 40 *Geo.* 3. 1 *M'Nally*, 386. A man named Welbourne was indicted for poisoning his fellow servant, Elizabeth Page. She declared to the surgeon who attended her that she was with child by Welbourne, and by his persuasion had been taking bitter apple and a white powder, which was found to be arsenic, for the purpose of procuring

abortion. She had recently been in great pain, and was extremely ill, apparently dying, and seemed to be sensible of her situation and danger, though she did not say so, but at the time she made the declaration she was free from pain, mortification having, in the opinion of the apothecary, taken place, and from being so free from pain he believed that she thought she was getting well. The declaration was received, and the prisoner was found guilty, but the case was referred to the judges on the question, that although in the first part of the apothecary's evidence, he swore that he made the deceased sensible of her danger before she made the declaration, yet, as he afterwards said that at the time she made the declaration she believed she was getting better, from the pain ceasing, the evidence ought to have been rejected; and a majority of the judges were of opinion, that it did not sufficiently appear that the deceased knew or thought, when she made the declaration, she was in a dying condition; on the contrary, she had reason to think that if she told what was the matter with her she might have relief and recover. *Welbourne's case*, 1 *Leach*, 503 (*n*), 1 *East, P. C* 358. *S. C.* The deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, replied "I am satisfied," and after this made a statement; it was held by Abbott, C. J. and Park, J. to be inadmissible as a declaration *in articulo mortis*, since it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might still have had a hope of recovery. *Christie's case*, *O. B.* 1821, *Carr. Supp. C. L.* 202. Where, on the day of receiving the injury, the deceased said he should not get better, and continued to say so to his nurse till the day of his death, which occurred eleven days afterwards, it was held that a declaration made on the day of his receiving the injury was admissible, although he had never expressed to the surgeon who attended him any opinion either of hope or apprehension, and although the surgeon thought there was a probability of recovery till the day before his death, which opinion however was not communicated to the patient. *Mosley's case*, 1 *Moo. C. C.* 97. Where the deceased was of so tender an age as not to be aware of the nature of his situation, his dying declarations are not admissible. Thus on an indictment for the murder of a girl four years of age, Park, J. refused to receive evidence of her declarations, observing, that however precocious her mind might be, it was impossible that she could have had that idea of a future state that is necessary to make such a declaration admissible. In this decision Mr. Justice James Parke concurred. *Pike's case*, 3 *C. & P.* 598. Where the proof of the deceased's knowledge of his situation was that

he said "he should never recover," Hullock, B. rejected the declaration, observing, "a man may receive an injury from which he may think that ultimately he shall never recover, but that would not be sufficient to dispense with an oath." *Van Butchell's case*, 3 *C. & P.* 631. Where the party being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never get better," and soon afterwards made a statement and died, Hullock, B. admitted this as a dying declaration. *Craven's case, Lewin, C. C.* 77. The surgeon said to the party, "You are in great danger," to which he answered, "I fear I am," and after this made a statement. Though he afterwards recovered so far as to think himself out of danger, the statement was admitted by Bayley, J. *Simpson's case, Lewin, C. C.* 78. *See also Mosley's case, Id.* 79. *Smith's case, Id.* 81.

Dying declarations—where reduced into writing.] Where the deceased made three several declarations at three several times in the course of the same day, as to the cause of the injury he had sustained; and the first and third accounts were not reduced into writing, but the second was taken down in writing, in the presence of a magistrate, by the same person to whom the former account was given; the account in writing being retained by the magistrate, who was not called, it was held (*Pratt, C. J. diss.*) that the accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declaration, because the prosecutor was disabled from giving an account of the second. *Reason's case*, 1 *Str.* 500, 16 *How. St. Tr.* 31. *S. C.* The prisoner was indicted for wilful murder. Depositions of the deceased, taken in writing by a magistrate, in the hospital where he lay, but not in the presence of the prisoner, were offered in evidence; it being objected that these depositions could not be read, as not having been taken pursuant to the statute 10 Car. c. 1. (Irish), Downs, J. ordered the magistrate to be sworn, and he having deposed that the deceased, at the time of making those depositions, was impressed with the fear of immediate death, his parol testimony of the facts declared by the deceased was admitted. *Callaghan's case, Cork Ass.* 1793, 1 *M'Nally*, 385.

Dying declarations—evidence in answer to proof of.] As the declarations of a dying man are admitted, on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence may enter into the particulars of his state of mind, and of his behaviour in his last moments; and may be allowed

to show that the deceased was not of such a character, as was likely to be impressed with a religious sense of his approaching dissolution. 1 *Phill. Ev.* 226.

CONFESSIONS.

Effect of, in general 28
Must be voluntary 29
Cases in which they have been held inadmissible . 29
Cases in which they have been held admissible . 30
Cases where Witnesses have made statements, and have afterwards been tried for the same Offence . 36
Evidence of facts, the knowledge of which has been obtained by improper Confessions, admissible , 36
Only evidence against the party making them . 38
By Agents 40
The whole of a Confession must be taken together . 41
Confessions of matters void in law, or false in fact . 42

Effect of, in general.] A voluntary confession made by a person who has committed an offence, is evidence against him, upon which he may be convicted, although the confession is totally uncorroborated by other evidence. *Wheeling's case,* 1 *Leach,* 311. (*n.*) *Eldridge's case, Russ. & Ry.* 440. And even where there is no other proof of the *corpus delicti,* as where, on an indictment for robbery, the party robbed did not appear at the trial, it was held by the twelve judges, that the prisoner was properly convicted on his own confession. *Falkner's case, Russ. & Ry.* 481. *White's case, Id.* 508. *Tippet's case, Id.* 509.

With regard to the degree of credit, which a jury ought to attach to a confession, much difference of opinion has existed. By some, it has been considered as forming the highest and most satisfactory evidence of guilt. *Grose, J. delivering opinion of the judges in Lambe's case,* 2 *Leach,* 554. The voluntary

confession of the party in interest, says Chief Baron Gilbert, is reckoned the best evidence, for, if a man swearing for his interest can give no credit, he must certainly give most credit when he swears against it. *Gilb. Ev.* 137. So it is stated by the court in *Warickshall's case*, 1 *Leach*, 263, that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and therefore, it is admitted as proof of the crime to which it refers. On the other hand, it is said by Mr. Justice Foster, (*Discourses*, 243.) that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted. This opinion has also been adopted by Sir W. Blackstone. 4 *Com.* 357. It has been said, that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. 1 *Phill. Ev.* 103. It cannot be doubted, however, that instances have occasionally occurred, in which, innocent persons have confessed themselves guilty of crimes of the gravest nature. Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards, it appeared, that Mr. Harrison was alive. *MS. case, cited* 1 *Leach*, 264. (*n.*)

Must be voluntary—cases in which confessions have been held inadmissible after promises, &c.] A confession is not admissible in evidence, unless it was made freely and voluntarily, and not under the influence of promises or threats. "A confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape, when it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." *Per Cur. Warickshall's case*, 1 *Leach*, 263.

With regard to what is such a promise or threat as will exclude a confession, it is laid down by Mr. East, 2 *P. C.* 659, that saying to the prisoner, it will be worse for him if he do not confess, or that it will be better for him if he do, is sufficient to exclude the confession according to constant experience. Thus where a surgeon called in to a prisoner, under a charge of murder, said to her, "you are under suspicion of this, and you had better tell all you know;" and after this, the prisoner made

a statement to the surgeon, Mr. Justice James Parke, after conferring with Mr. Justice Littledale, held that evidence of this statement was inadmissible. *Kingston's case*, 4 *C. & P.* 387. So where a constable said to a prisoner charged with larceny, "It is of no use for you to deny it; for there are the man and boy who will say they saw you do it;" a confession made after this, was rejected by Gurney, B. *Mills's case*, 6 *C. & P.* 146. So where the words were, "It would have been better if you had told at first." *Walkley's case*, 6 *C. & P.* 175. So where the prosecutor said, "if you will tell me where the property is, I will be favourable to you;" Gould, J. rejected the evidence, saying, that the slightest hope of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession. *Cass's case*, 1 *Leach*, 293. (*n.*) So where the prosecutor, on the prisoner, who had stolen his money, being apprehended, said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased," upon which, the prisoner pulled some money out of his pocket, and said it was all he had left of it; it was held by a majority of the judges that this evidence was inadmissible. *Jones's case*, *Russ. & Ry.* 152. *sed vide Griffin's case*, *Id.* 151. *post.* Where a prisoner in custody said to the officer in charge of him, "If you will give me a glass of gin, I will tell you all about it;" and two glasses of gin being given to him, he made a full confession of his guilt, Best, J. considered it as very improperly obtained, and inadmissible in evidence. *Sexton's case*, *Chetw. Burn, Tit. Confession.* But the authority of this case has been doubted by an able text writer. 1 *Deacon, Dig. Cr. Law*, 424. (*n.*) It certainly differs from the former decisions in the circumstance of the offer to confess coming, in the first instance, from the prisoner. So where a confession is made with a view, and under the hope of being thereby permitted to turn king's evidence, it is not admissible. *Hall's case, cited*, 2 *Leach*, 559. Though if he is admitted, and refuses to give evidence on the trial of his accomplices, he may be convicted upon such confession. *Burley's case*, *Stark. Ev. part* iv. *p.* 23. 1*st ed.* If a confession has been obtained from a prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted. *White's case*, *M. T.* 1800. 1 *Phill. Ev.* 104. *vide post.*

Must be voluntary — cases in which confessions have been held admissible.] It is not every hope of favour held out to a prisoner that will render a confession afterwards made by him inadmissible, the promise must have some reference to his escape from the charge. Thus where a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, "If you will tell where the property is, you shall see your wife," Patteson, J. held that a con-

fession made afterwards was admissible. *Lloyd's case*, 6 *C. & P.* 393.

Although a confession made under the influence of a promise or a threat is inadmissible, there are yet many cases in which it has been held, that notwithstanding such threat or promise may have been made use of, the confession is to be received, if it has been made under such circumstances as to create a reasonable presumption, that the threat or promise had no influence, or had ceased to have any influence upon the mind of the party.

Thus if the impression that a confession is likely to benefit him has been removed from the mind of a prisoner, what he says will be evidence against him, although he has been advised to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but on his being examined before the committing magistrate on the following day, was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances was held by Mr. Justice Bayley, to be clearly admissible. *Lingate's case*, 1815. 1 *Phill. Ev.* 105. So where it appeared that a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and again in prison, to another magistrate; the judges unanimously held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *Rosier's case, East, T.* 1821. 1 *Phill. Ev.* 105. So it has been held to be no objection to a confession made before a magistrate, that the prosecutor, who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out; as the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but say what he thought proper. *Edward's case, East, T.* 1802. 1 *Phill. Ev.* 104. A prisoner charged with murder, was visited by a magistrate, who told him that if he was not the man who struck the fatal blow, he would use all his endeavours and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder. The magistrate wrote to the secretary of state, who returned an answer, that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. *Littledale, J.* ruled that a confession subsequently made

by the prisoner to the coroner was admissible, for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *Clewes's case*, 4 *C. & P.* 224. See also *Howes's case*, 6 *C. & P.* 404. A girl charged with poisoning, was told by her mistress, that if she did not tell all about it that night, the constable would be sent for next morning, to take her to S. (meaning before the magistrates there,) upon which the prisoner made a statement. The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrates, without any inducement from the constable, she confessed to him. Bosanquet, J. said, "I think this statement receivable. The inducement was, that if she confessed that night, the constable would not be sent for, and she would not be taken before the magistrates. Now she must have known, when she made this statement, that the constable was taking her to the magistrates. The inducement therefore was at an end." *Richards's case*, 5 *C. & P.* 318.

It is said by Mr. Justice Buller, that there must be very strong evidence of an explicit warning by a magistrate, not to rely on any expected favour, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence. 2 *East, P. C.* 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained, by giving the prisoner two glasses of gin, the officer to whom it had been made, read it over to the prisoner, before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the papers. Best, J. considered the second confession, as well as the first, inadmissible; and said that had the magistrate known that the officer had given the prisoner gin, he could, no doubt, have told the prisoner, that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression, might sign the confession before the magistrate. *Sexton's case*, *Burn, Tit. Confessions.* So where the committing magistrate told the prisoner, that if he would make a confession, he would do all he could for him; and no confession was then made, but after his committal the prisoner made a statement to the Turnkey, who held out no inducement, and gave no caution, Parke J. said he thought the evidence ought not to be received, after what the committing magistrate had said to the prisoner,

more especially as the Turnkey had not given any caution. *Cooper's case*, 5 *C. & P.* 535.

Where the promise or threat proceeds from a person who has no power to enforce it, and who possesses no control over the prisoner, a confession made under such circumstances is admissible. Thus where some neighbours, who had nothing to do with the apprehension, prosecution, or examination of a prisoner, officiously interfered and admonished him to tell the truth and consider his family, and no answer was made either by the constable or the prisoner, but the latter, an hour afterwards, confessed to the constable in prison, the confession was held by the judges to be admissible, because the advice to confess was not given or sanctioned by any person that had any concern in the business. *Row's case*, *Russ. & Ry.* 153, 1 *Phill. Ev.* 104. *S. C.* So where the counsel for a prisoner objected to the admissibility of a confession made before the committing magistrate, and offered to prove that the wife of the constable had told the prisoner some days before the commitment, that it would be better for him to confess; Wood, B. overruled the objection, and admitted the confession. *Hardwicke's case*, *Nott. Lent Ass.* 1811. 1 *Phill. Ev.* 105. And where a witness stated that he had held out no threat or promise to induce the prisoner to confess, but that a woman who was present said, that she had told the prisoner that she had better tell all, upon which the prisoner made certain confessions to the witness, Parke J., after consulting with Hullock B. ruled, that as no inducement had been held out by the witness, to whom the confession was made; and as the only inducement had been held out by a person having no sort of authority, it must be presumed that the confession to the witness was free and voluntary. If the promise had been held out by any person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here a person having no authority of any sort, officiously says, "you had better confess;" no confession follows, but some time afterwards the prisoner, without any inducement held out, confesses to another person. *Gibbon's case*, 1 *C. & P.* 97. So where it appeared that the prisoner was told by a man that another prisoner had told all, and that he had better do the same to save his neck; upon which he confessed to the constable; Hullock B. held that as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence. *Tyler's case*, 1 *C. & P.* 129. In a late case (*Dunn's case*, 4 *C. & P.* 543) Mr. Justice Bosanquet is reported to have said that "*any* person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for him to con-

fess, will exclude a confession subsequently made to another person, is very often a nice question, but it will always exclude a statement made to the same person." These positions do not appear to be supported by prior authorities. If after the promise has been made, such circumstances should take place, as to induce a presumption that a subsequent confession has not been made under the influence of that promise, there appears to be no reason for rejecting the confession, because the person to whom it is made, is the same to whom the former confession was also made.

There is some difficulty in saying what is such a threat as will influence the validity of a confession. In the following case the circumstances were held not to operate as a threat or promise. The chief officer of the police at Liverpool, stated that on the 18th November, the prisoner was apprehended by his direction without any warrant, between twelve and one o'clock; and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell of his own authority, between four and five o'clock, and between five and six o'clock he told the prisoner, that in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire, and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The officer replied that he would not have told so many falsehoods as he had, if he had not been concerned in it, and he again asked him if any body had induced him to do it? The prisoner then began to cry and made a full confession. The prisoner was taken before he had dined, and had had no food from the time he was apprehended until after his confession. Mr. Justice Bayley thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and where the conduct of the officer was likely to intimidate, was admissible in evidence; and reserved the point for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. Best, C. J. Bayley, and Holroyd JJ. were of a contrary opinion. *Thornton's case*, 1 *Moody, C. C.* 27. Where, on a prisoner being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was enough against him to send a bill before the grand jury, upon which the prisoner immediately made a confession; the reception of the confession was objected to, on the ground of its having been made upon a threat, but Parke J. overruled the objection, saying that he rather considered it as a caution. *Wright's case*

Lewin, C. C. 48. Where a prisoner, charged with arson, was told "that there was a very serious oath laid against her by B. B., who had sworn that she had set fire to O.'s rick," a confession afterwards made by the prisoner, was received in evidence. *Long's case*, 6 *C. & P.* 179.

The threats or promises must have reference to some temporal advantage, in order to invalidate a confession. Where a prisoner accused of a murder, had repeated interviews with a clergyman, who urged him to repentance, telling him that "before God it would be better for him to confess his sins," that "his fears respecting his participation in the dreadful deed were fully confirmed, and that, while he was in that state of mind, he (the chaplain) could afford him no consolation by prayer," and subsequently to these exhortations, the prisoner made a confession; the judges were unanimously of opinion that it was properly received in evidence, and the prisoner was executed. *Gilham's case*, 1 *Moody, C. C.* 186, 2 *Russ.* 648. *S. C.* The prisoner being charged with setting fire to an outhouse, her mistress pressed her to confess, telling her amongst other things, that if she would repent and confess, God would forgive her, but she concealed from her that she would not forgive her herself. The prisoner having confessed, another person, the next day, in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J. admitted the confessions, and the prisoner was convicted. The jury on having the confessions put to them, thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the judges were of opinion that these points were not for the jury; but that if Lord Eldon agreed with the jury (which he did), the confessions were not receivable; but many of the judges thought the expressions not calculated to raise hopes of favour here, and if not, the confessions were evidence. *Nute's case, Chetw. Burn, Tit. Confession*; 2 *Russ.* 648.

Where a confession has been obtained by artifice, but without the use of promises or threats, it is admissible. Thus it has been held, that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody; and even though some artifice has been used to draw him into that supposition. *Burley's case, East, T.* 1818. 1 *Phill. Ev.* 104. So where a prisoner asked the Turnkey if he would put a letter into the post, and on receiving a promise that he would do so, gave him the letter, which was detained by the Turnkey, and given in evidence as a confession at the trial, Garrow, B. received the evidence. *Derrington's case*, 2 *C. & P.* 418.

Must be voluntary—cases where witnesses have made statements, and have afterwards themselves been tried for the offence.] A question sometimes arises whether a statement which has been made by a party upon his examination as a witness, can be given in evidence against him, if he should himself be put upon his trial for the same offence. The general rule is, that admissions made under compulsory process, are evidence against the party. *Rosc. Dig. Ev. N. P.* 36. So it is said by Mr. Starkie, that when a witness answers questions upon his examinations on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes. 2 *Stark. Ev.* 28. 2*d ed.* Thus upon an indictment against a magistrate for misconduct in his office, evidence was permitted to be given of what he had said upon his examination before a committee of the House of Commons, although it was objected that as that examination was compulsory, his admission could not be voluntary. *Merceron's case*, 2 *Stark.* 366. So where a person was brought up as a witness upon a charge of arson, but attempting to run away, was detained by a constable, a statement made by him to the constable was received in evidence against him, upon an indictment afterwards preferred against him for the same offence, and he was convicted and executed. *Swatkin's case*, 4 *C. & P.* 548. But in another case, where the prisoner had been examined on oath, as a witness, touching a charge of poisoning, against another person, and at the conclusion of the trial was committed for trial himself on the same charge, upon his deposition being tendered in evidence as a confession, Gurney B. is reported to have said, "This being a deposition made by the prisoner at the same time as all the other depositions, on which he was committed, and on the very same day on which he was committed, I do not think the examination was perfectly voluntary." *Lewis's case*, 6 *C. & P.* 161. It seems that this decision is at variance with the general rule of law, and with the other cases on the same subject. *See Howorth's case, post, p.* 45.

The examinations of persons under compulsory process, are prohibited from being given in evidence against them, upon an indictment for stealing a will or a writing relating to real estate, under 7 & 8 G. 4. c. 29. ss. 22, 23, 24.

Must be voluntary—evidence of facts, the knowledge of which has been obtained by improper confessions, admissible.] Although a confession obtained by means of promises or threats, cannot be received, yet if, in consequence of that confession, certain facts, tending to establish the guilt of the prisoner are made known, evidence of those facts may be received. "A fact," it is said by the court in *Warickshall's case*, 1 *Leach*, 264, "if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived, be, in

other respects, true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession, from which they have been derived." The same doctrine, viz. that no part whatever of the confession is to be received in evidence, was also laid down by Lord Eldon, in the case of Richard Harvey, at Bodmin summer assizes, 1800. His lordship said, that where the knowledge of any fact was obtained from a prisoner, under such a promise, as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved, would have been sufficient to warrant a conviction without any confession leading to it. 2 *East, P. C.* 658. The rule, however, as above laid down, appears to be too strict, and accordingly it is said in *Butcher's case*, 1 *Leach*, 265, (*n.*) that it should seem that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true. But this opinion, says Mr. East, (citing several cases) must be taken with some grains of allowance; for even in such case, the most that is proper to be left to the consideration of the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case; and this, he adds, is now the more common practice. 2 *East, P. C.* 658. Upon this it may be observed, that such a confession appears to be evidence only of the *fact* that the prisoner was acquainted with the other fact which he disclosed, and that so far as such knowledge goes, it is evidence to convict him of the offence. Where a prisoner, indicted as a receiver of stolen property, in consequence of promises of favour, made a full confession, and according to that confession, the property was found at her lodgings, concealed between the sackings of her bed; it was held that evidence of the finding was admissible. *Warickshall's case*, 1 *Leach*, 263. So the evidence of a third person, the knowledge of which is got at, through a confession obtained by favour, is admissible; as where the prisoner named the person to whom the property had been disposed of, it was held that such person might be called. *Lockhart's case*, 1 *Leach*, 386. *See also Mosey's case*, 1 *Leach*, 265. (*n.*)

It is said in *Warickshall's case*, 1 *Leach*, 265., that although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confessions. It seems however that such acts, if they are only tan-

tamount to a confession, and are unsupported by *facts*, are inadmissible. A prisoner charged with stealing, was induced by a promise from the prosecutor to confess, and after confessing, carried the officer to a particular house where he said he had disposed of the property, and pointed out the person to whom he said he had delivered it. That person denied the fact, and the property was not found. The evidence of the confession was not received; but the evidence of his carrying the officer to the house was. The judges were of opinion that the latter evidence was not admissible. The confession was excluded, because being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct. *Jenkins's case, Russ. & Ry.* 492.

Declarations, accompanying an act done, that act being corroborated by a fact, have in one case been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory notes. The prosecutor was proceeding to state an improper confession, when Chambre J. stopped him, but permitted him to prove that the prisoner brought to him a guinea and a 5*l*. Reading Bank note, *which he gave up to the prosecutor, as the guinea and one of the notes that had been stolen from him.* The learned judge told the jury, that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence, that it was the stolen note. A majority of the judges, (7) held the conviction right. Lawrence and Le Blanc JJ. were of a contrary opinion, and Le Blanc said that the production of the money by the prisoner was alone admissible, and not that he said it *was one of the notes stolen. Griffin's case, Russ. & Ry.* 151.

Only evidence against the party making them.] A confession is only evidence against the party himself who made it, and cannot be used against others. *Tong's case, Kel.* 18. *Gilb. Ev.* 137. *Hevey's case,* 1 *Leach,* 235. So when it was proposed to be proved on the trial of three prisoners, that on their examination, one of them, who was charged by the examination of another with having jointly committed the felony in question, did not deny that what was so said was true, Holroyd J. held that it was not competent to the prosecutor to go into such evidence, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester. *Appleby's case,* 3 *Stark.* 33. The same principle was acted upon in *Melen* v. *Andrews, M. & M.* 336. "The deposition of a witness," says Mr. Justice James Parke, in that case, "taken in a judicial proceeding, is not evidence on the ground that the party against

whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who being a stranger to the matter under investigation, had not the right of interfering, and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature there is a regularity of proceeding adopted, which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inference, therefore, cannot be drawn from his silence, or his conduct in this case, which generally may from that of a conversation in his presence." But it would be otherwise, if what was said drew any answer from the prisoner; what passed in such a case would be evidence. *See Child* v. *Grace*, 3 *C. & P.* 193. As to confessions and admissions in *Conspiracy*, *vide post*.

Where a confession by one prisoner is given in evidence, which implicates the other prisoners by name, a doubt arises as to the propriety of suffering those names to be mentioned to the jury. On one circuit the practice has been to omit the names; *Fletcher's case*, 4 *C. & P.* 250.; but it has been ruled by Littledale J. in several cases, that the names must be given. Where it was objected on behalf of a prisoner whose name was thus introduced, that the witness ought to be directed to omit his name, and merely say *another person*, Littledale J. said, "the witness must mention the name. He is to tell us what the prisoner said, and if he left out the name he would not do so. He did not say "another person," and the witness must give us the conversation just as it occurred; but I shall tell the jury that it is not evidence against the other prisoner." *Hearne's case*, 4 *C. & P.* 215. *Clewes's case*, *Id.* 225.

It is said by Mr. Phillipps, that a distinction might perhaps be taken in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separated, and detached from the rest, and can be omitted without in any degree affecting the prisoner's narrative against himself. 1 *Phill. Ev.* 108. Upon this it may be remarked, that the same observation seems equally to apply to confessions not in writing, where the witness might be cautioned not to mention the names of the other prisoners, unless from such omission the confession, as affecting the party making it, should become unintelligible. The rule as laid down by Mr. Justice Littledale, has been acted upon by him in the case of *written* confessions also. A letter written by one of several prisoners was offered in evidence. It immediately implicated one of the others; and it was objected that the name of all but the prisoner in question should be omitted in the reading. But Littledale J. ruled the contrary, and said that to make it evidence the whole must be read. *Fletcher's case*, *Lewin C. C.* 107.

4 *C. & P.* 250. *S. C.* In a later case, before Parke J., in which *Fletcher's case* was cited, the learned Judge said, "I know that is Mr. Justice Littledale's opinion, but I do not like it. I do not think it the fair way." *Barstow's case, Lewin, C. C.* 110. Other Judges however have ruled in the same manner as Mr. Justice Littledale. Alderson, J., *Hall's case, Lewin, C. C.* 110. Denman, C. J., *Foster's case. Id.*

Upon the same principle, the confession of the principal is not admissible, in evidence, to prove his guilt, upon an indictment against the accessory. This was long considered a doubtful point, and in a very late case, Bosanquet, J. is stated to have said that whatever is evidence against the principal, is *primâ facie* evidence of his guilt, as against the accessory, to prove the felony. *Black's case*, 4 *C. & P.* 377, *stated post.* The law was, however, decided to be otherwise, by the judges in the following case: Turner was indicted for stealing sixty sovereigns, &c. by one Sarah Rich, then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the presence of the prisoner, in which, she stated various facts, implicating herself and others, as well as the prisoner. *Appleby's case* (*supra*) was cited on the other side, and Patteson, J. refused to receive as evidence anything which was said by Sarah Rich respecting the prisoner, but admitted what she had said respecting herself, only. The prisoner was convicted. Having afterwards learned that a case had occurred before Mr. Baron Wood, at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson, J. thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" All the judges having met, (except Lord Lyndhurst, C. B. and Taunton, J.) were unanimously of opinion, that Sarah Rich's confession was no evidence against the prisoner, and many of them appeared to think that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been evidence of her guilt, which must have been proved by other means. The conviction was held wrong. *Turner's case*, 1 *Moody, C. C.* 347.

By agents.] In general a person is not answerable, criminally, for the acts of his servants or agents, and therefore, the declarations or confessions of a servant or agent will not be evidence against him. But it is otherwise, where the declaration relates to a fact in the ordinary course of the agent's employment, in which case such declarations accompanying an act

done, will be evidence in a criminal proceeding, as well as in a civil suit. *See Rosc. Dig. Ev. N. P.* 30. Thus in the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form, by Mr. Douglas, (who was proved to have been appointed by Lord Melville, to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same) was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster, did receive from the exchequer a certain sum of money in the ordinary course of business. 29 *How. St. Tr.* 746.

In what cases a prosecutor may be affected by the acts and declarations of his agents does not appear to be well decided. In the *Queen's case* the judges held that it was not competent to show that the agent of the prosecutor, not called, offered a bribe to a witness, who was also not called. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving, therefore, those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His Lordship added, that notwithstanding the opinion he had delivered, he was by no means prepared to say that in no case, and under no circumstances, appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature to be submitted to the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the offered proof. 2 *Brod. & Bing.* 302.

The whole of a confession must be taken together.] In criminal, as well as in civil cases, the whole of an admission made by a party is to be taken together. *See Rosc. Dig. Ev. N. P.* 36. The rule is thus laid down by Abbott, C. J. in the *Queen's case*, 2 *Brod. & Bing.* 297. If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. "There is no doubt," says Mr. Justice Bosanquet, "that if a prose-

cutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." *Jones's case*, 2 *C. P.* 629. Where a prisoner was indicted for larceny, and in addition to evidence of the possession of the goods, the counsel for the prosecution put in the prisoner's statement before the magistrate, in which he asserted that he had bought the goods, Garrow, B. is reported to have directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. *Anon. cited arg. Jones's case*, 2 *C. & P.* 630. It must not, however, from this, be suppposed that every part of a confession is entitled to equal credit. A jury may believe that which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. Thus in a case similar to that before Mr. Baron Garrow, the prosecutor having put in the prisoner's examination, which merely stated that "the cloth was honestly bought and paid for," Mr. Justice J. Parke told the jury, "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him, but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *Higgins's case*, 3 *C. & P.* 603. So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, Littledale, J. left the confession to the jury, saying, "It must be taken altogether, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it and disbelieve another." *Clewes's case*, 4 *C. & P.* 225. See also *Steptoe's case*, 4 *C. & P.* 397. *S. P.*

Confessions of matters void in point of law or false in fact.] An admission on the part of a prisoner is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight. Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquitted. 3 *Stark. Ev.* 1187, 1*st ed.* So on an indictment

for setting fire to a ship, with intent to injure two part owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. *Philp's case*, 1 *Moody's C. C.* 271.

EXAMINATIONS.

Statute 7 *Geo.* 4. *c.* 64 43
Mode of taking Examinations . . . 44
Questioning the Prisoner 44
Examinations must not be taken on Oath . . 44
When reduced into writing and when not . 45
Signature to Examinations . . . 46
Examinations informal—used to refresh memory of Witness 47
Mode of Proof 48

Statute 7 *Geo.* 4. *c.* 64.] The foregoing pages relate only to the confessions and admissions made, by persons charged with offences, to third persons, and not made to magistrates during the examinations directed to be taken by statute. Those examinations formerly taken under the 1 & 2 P. & M. c. 13. and 2 & 3 P. & M. c. 10., are now governed by the 7 Geo. 4. c. 64.

By that statute, s. 2, it is enacted, "That the two justices of the peace, before they shall admit to bail, and the justice or justices before he or they shall commit to prison any person arrested for felony, or on suspicion of felony, shall *take the examination of such person* and *the information* upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery,

or superior criminal court of a county palatine, or great sessions, or sessions of the peace, at which the trial thereof is intended to be; then and there to prosecute or give evidence against the party accused: and such justices and justice respectively shall subscribe all such examinations, bailments, and recognizances, and deliver, or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court."

Before the above statute, the justices had no power to take the examination of persons charged with misdemeanours; but now, by sec. 3, it is enacted—"That every justice of the peace, before whom any person shall be taken, on a *charge of misdemeanour or suspicion thereof*, shall take the examination of the person charged, and the information, upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison or require bail from the person so charged, and in every case of bailment shall certify the bailment in writing; and shall have authority to bind all persons by recognizance, to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony, and shall subscribe all examinations, informations, bailments and recognizances, deliver or cause the same to be delivered, to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony."

By 7 Geo. 4. c. 38. s. 1. Commissioners for trying offences committed at sea, or a justice of the peace, may take examinations touching offences committed within the jurisdiction of the Admiralty, and may commit the parties charged.

Mode of taking examinations—questioning the prisoner.]—Where an examination (taken under the statute of P. & M.) was offered in evidence, and the magistrate who took it stated that he had examined the prisoner to a considerable extent, in the same manner as he was accustomed to examine a witness, Richards, C. B. rejected the examination, saying that it was irregular in the magistrate to examine a prisoner in this manner. *Wilson's case, Holt*, 597. But the contrary was held by Mr. Justice Holroyd. *Stark. Ev. App. part* iv. *p.* 52, 1*st ed.* And it was ruled the same way at the Old Bailey, on an indictment for murder. *Jones's case*, 2 *Russ.* (*a*). In a late case also, Mr. Justice Littledale held the decision of Holroyd, J. to be correct, and admitted an examination elicited by questions put by the magistrate. *Ellis's case, Ry. & Moo. N. P. C.* 432. *See also Thornton's case*, 1 *Moody, C. C.* 27, *ante, p.* 34.

Mode of taking examinations—must not be upon oath.] The examination of a prisoner must not be taken upon oath. Where

the examination of a prisoner was produced, commencing—"The examination of A. B., taken on oath before" &c., Le Blanc, J. rejected it, and would not permit evidence to be given that no oath had, in fact, been administered, saying, that he could not allow that which had been sent in under the hand of a magistrate to be disputed. *Smith's case*, 1 *Stark.* 242. Where the prisoner, being mistaken for a witness, was sworn, but the mistake being discovered, the deposition, which had been commenced, was destroyed, and the prisoner, subsequently, after a caution from the magistrate, made a statement, Garrow, B. received that statement. *Webb's case*, 4 *C. & P.* 564. And where a prisoner had been examined upon oath, on a charge against another person, Parke, J. received evidence of that examination, as a confession, observing, that upon that, as upon every other occasion, the prisoner might have refused to answer any questions having a tendency to expose him to a criminal charge, and not having done so, his examination was evidence against him. *Howarth's case, Greenwood's Col. Stat.* 138. (*n*). *Vide ante, p.* 36.

Mode of taking—when reduced into writing, and when not.] The statute requires that the examination, or as much thereof as may be material, shall be reduced into writing, and therefore, when reduced into writing, such writing is the best evidence, and parol evidence of the examination cannot be received. In order to render parol evidence of the examination admissible, it must be clearly proved that, in fact, such examination was not reduced into writing. *Jacob's case*, 1 *Leach*, 310. If the examination be not returned, and it is uncertain whether it has been reduced into writing or not, parol evidence will be rejected. *Hinxman's case, Id.* (*n.*) *Fisher's case, Id. p.* 311. (*n.*)

But where it clearly appears that no examination in writing has been taken, parol evidence of what the prisoner said before the magistrate is admissible. Thus, where the only evidence against a prisoner was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, all the judges (except Mr. Justice Gould) were of opinion that this evidence was well received. *Huet's case*, 2 *Leach*, 821. A written examination before a magistrate will not exclude parol evidence of a *previous* confession made to a third person. *Carty's case*, *M'Nally on Ev.* 45. *See also* 16 *How. St. Tr.* 35. And it was said by Best, C. J. that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashby, Ry. & Moo.* 232. So it has been ruled by Parke, J. that an incidental observation made by a prisoner in the course of his examination before a magistrate,

but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *Moore's case, Matthew's Dig. Cr. Law*, 157. But where it ought to have been taken down in writing, and it was not, Littledale, J. ruled that it was inadmissible. *Malony's case, Id.* However, where on the examination of a prisoner, on a charge of stealing sheep, what was said as to the stealing of certain sheep, the property of one person, was taken down in writing by the magistrate, but not what was said as to other sheep, the property of another person, on a question reserved for the opinion of the judges, whether any confession, as to the latter offence, could be supplied by parol evidence; and whether, as the magistrate had taken down in writing every thing he heard, and intended to take down all that was said to him, and believed he did so, parol evidence could be given of any thing else that had been addressed to him; the judges present were all of opinion that the evidence was admissible. *Harris's case*, 1 *Moody, C. C.* 343. Where a written examination was inadmissible, on account of the mode of taking it, Tindal, C. J. permitted parol evidence to be given of what the prisoner had said at the time of his examination. *Reed's case, Moo. & Mal.* 403.

Mode of taking examinations—signature.] The examination of a prisoner, when reduced into writing, ought to be read over to him, and it is usually tendered to him for his signature, though such signature is not required by the statute, and is only for precaution, and for the facility of future proof. 2 *Russ.* 657. 1 *Phill. Ev.* 107. But where the examination of a prisoner was taken in writing, and afterwards read over to him, upon which he observed, "It is all true enough," but upon the clerk's requesting him to sign it, he said, "No, I would rather decline that," nor was it signed, either by him or by the magistrate; a majority of the judges were of opinion, that the written examination was rightly received in evidence. *Lambe's case*, 2 *Leach*, 552. So where the solicitor for the prosecution made minutes, at the request of the magistrate, of what the prisoner said before the magistrate, and those minutes were read over to the prisoner, who said, "It is all true," but afterwards, on the minutes being again read, objected to some parts of them, and refused to sign them, it was held that they might be read in evidence against the prisoner. *Thomas's case*, 2 *Leach*, 637. But where the examination of a prisoner, confessing his guilt, was put into writing, and he was desired to sign it, which he refused to do, although he admitted his guilt, Wilson, J. refused to receive it, saying, that it was competent to a prisoner under such circumstances, to retract what he had said, and to say that it was false. *Bennet's case*, 2 *Leach*, 553. (*n.*) And

where an examination was offered in evidence, and the clerk of the magistrate stated that he took it down from the mouth of the prisoner, and that it was afterwards read over to him, and he was told that he might sign it or not as he pleased, upon which, he refused to sign it, Wood, B. was of opinion that the document could not be read. In *Lambe's case*, the prisoner, when the examination was read over to him, said that it was true, and here, if the prisoner had said so, the case might have been different. *Tellicote's case*, 2 *Stark.* 484. *and see Jones's case*, 2 *Russ.* 658. *post*, *p.* 48. The prisoner having refused to sign his examination before the magistrate, or to admit its truth, Bayley, J. allowed parol evidence to be given of the prisoner's statement, and permitted the magistrate's clerk to read over the examination to refresh his memory. *Dewhurst's case*, *Lewin*, *C. C.* 47. It seems difficult to maintain the decision in *Tellicote's case.* Where the examination is offered in evidence as a document, to which authority is given by statute, there seems to be no objection to its reception on the ground of the party's subsequent dissent, which is evidence to go to the jury. Where a confession is made to another person than a magistrate, and afterwards retracted, the whole would, without doubt, be admissible, and it is difficult to distinguish the two cases.

If the examination is taken down in writing, by a constable only, and is not, therefore, under the statute, yet if the prisoner signs it, the paper itself may be read in evidence. *Swalkin's case*, 4 *C. & P.* 550. This rests upon the general principle of law, with regard to admissions, under which, letters, &c. are read in evidence.

Examinations informal—used to refresh the memory of witness.] If the examination of a prisoner has been taken down in writing, but not in such a manner as that the writing itself is admissible under the statute, parol evidence of what the prisoner said is admissible, *vide antè*, *p.* 45 ; and in such case the writing may be referred to by the witness who took down the examination, in order to refresh his memory. Thus, where a person had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him ; it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of the examination. *Layer's case*, 16 *How. St. Tr.* 215. So where an examination taken at several times, was reduced into writing by the magistrate, and on its being completed, was read over to the prisoner, but he declined to sign it, acknowledging at the same time that it contained what he

had stated, although he afterwards said, that there were many inaccuracies in it; it was held that this might be admitted as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement. *Jones's case*, 2 *Russ.* 658. (*n.*) It has been suggested that in *Tellicote's case*, *supra*, *p.* 47., although the written document was inadmissible, yet the clerk of the magistrate, who was called as a witness, ought to have proved what he heard the prisoner say on his examination, and might have refreshed his memory by means of the examination, which he had written down at the time. 2 *Russ.* 658. *See* 4 *C. & P.* 550. (*n.*) *And see Dewhurst's case*, *ante*, *p.* 47. So where, on a charge of felony, the examination of the prisoner was reduced into writing, by the magistrate's clerk, but nothing appeared on the face of the paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it, were then acting as magistrates; Patteson, J. permitted the clerk to the magistrates to be called, and to refresh his memory from this paper. *Tarrant's case*, 6 *C. & P.* 102, *and see Pressley's case*, *Id.* 183.

The effect of the statutes is properly stated to be, that a written examination taken in conformity to them is evidence *per se*, and the only admissible evidence, of the prisoner having made a declaration of the things contained therein; whereas at common law (unless the prisoner had signed the paper, or on its being read to him, had allowed it to be true) the confession must have been proved by some one who heard it and could recollect it, and the writing could only have been made use of by the person who wrote it, to refresh his memory with it. 2 *Russ.* 659. (*n.*)

Mode of proof.] It is laid down by Lord Hale, that in proving examinations of prisoners, and informations of witnesses taken before justices of the peace, oath is to be made in court by the justice or his clerk, that the examinations or informations were truly taken. 2 *Hale*, *P. C.* 52. 284. In practice, however, it is said, in a book of authority, to be certainly not unusual to permit the examination to be read upon proof of the identity of the instrument, and of the handwriting of the magistrate if he has signed the examination which now, by statute 7 G. 4. c. 64. he is in all cases required to do. 2 *Russ.* 659. (*n*) It is obviously desirable that some person, who was present at the examination, and who can state the mode in which it was taken, should be called to prove it. Where upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner, by evidence of the handwriting of the latter, and by calling a person who was present at the examination, it appearing that there were certain interlineations in the examination, Lord Lyndhurst said, that he

thought the clerk who had taken down the examination, ought to be called, and the evidence was withdrawn. *Brogan's case, Lanc. Sum. Ass.* 1834, MS. But where the magistrate who had signed the examination was present to prove the signature, Holroyd J. held that it was not necessary to call the clerk who had written it. *Hobson's case, Lewin, C. C.* 66. And where the examination purported to be the examination of the prisoner, and was signed by him and the magistrate, proof of their handwriting was held sufficient, and that it was unnecessary to show that it was taken from the prisoner's mouth, or that he deposed to the facts contained in it. *Priestley's case, coram Parke, J. Lewin, C. C.* 74.

DEPOSITIONS.

Stat. 7 *Geo.* 4. *c.* 64. . . . 49
Mode of taking Depositions . . . 50
Signature 52
Parol Evidence not admissible to vary Depositions . 52
Depositions admissible on trial of other offences, than that with which the prisoner is charged . 52
Depositions admissible to contradict Witness . 52
Several Depositions 53
Depositions before the Coroner . . . 53
Depositions in India, by consent, &c. . . 54

Statute 7 *G.* 4. *c.* 64.] The clauses of the statute 7 G. 4. c. 64. relating to taking the depositions of witnesses in criminal cases, by which the former statutes of 1 & 2 P. & M. c. 13, 14, and 2 & 3 P. & M. c. 10. are repealed, have already been stated. *Ante, p.* 43. Although as in the former statutes, there is no express enactment in the 7 Geo. 4. that the depositions of the witnesses taken under that statute, shall be admissible in case of their death; yet it is clear that should the witness be proved at the trial either to be dead, 1 *Hale, P. C.* 305, *B. N. P.* 242, (and this though the deceased was an accomplice, *Westbeer's case,* 1 *Leach,* 12.) or to be insane, *R. v. Eriswell,* 3 *T. R.* 710, or (as it seems) to be unable to travel, 1 *Hale, P. C.* 305, 1 *Phill. Ev.* 351, his depositions taken before the magistrate, will be admissible in evidence. So it has been said, that if due diligence has

been used, and it is made manifest that the witness has been sought for and cannot be found, or if it be proved that he was subpœnaed and fell sick by the way, his depositions may be read, for that in such case he is in the same circumstances as to the party that is to use him, as if he were dead. *B. N. P.* 239. *Hawk. P. C. b.* 2. *c.* 46. *s.* 18. It has however, been observed by Mr. Starkie, that it seems to be very doubtful, whether the mere, casual, and temporary inability of the witness to attend in a criminal case, be a sufficient ground for admitting his deposition, which affords evidence of a nature much less satisfactory than the testimony of a witness examined, *vivâ voce*, in court, and which might be procured at another time, if the trial were to be postponed. 2 *Stark. Ev.* 266. 2*nd ed.* It has been held, with regard to a witness examined before the coroner, that if he is absent, proof that every endeavour has been made to find him, will not authorise the reading of his examination. *Lord Morley's case, Kel.* 55. This decision appears to have been thought by Serjeant Hawkins, to have proceeded on the ground that proper search had not been made; *Hawk. P. C. b.* 2. *c.* 46. *s.* 17, 18; and Gilbert, C. B. states that the examination may be read, because, as he supposes, it is to be presumed that the witness is dead, when he cannot be found after the strictest inquiry. *Gilb. Ev.* 138.

If the witness be kept away by the practices of the prisoner, upon proof of this, his depositions may be read. *Harrison's case*, 4 *St. Tr.*] 492. *Lord Morley's case, Kel.* 55. 6 *How. St. Tr.* 776. (*examination before the coroner.*)

The statute 7 G. 4. c. 64. relates only to depositions taken, where a party is charged with *felony*, suspicion of *felony*, or misdemeanor; and in case of treason, therefore, where the common law rule remains, the depositions are inadmissible. *Foster*, 337. 2 *Russell*, 663. 1 *Hale*, 306.

Before the depositions can be read they must be proved, which is usually done, either by calling the magistrate before whom they were taken, or his clerk who wrote them; 2 *Hale*, 52. 284, *see ante, p.* 48. and it must appear that they are the same that were taken before the magistrate, without any alteration whatever. *Hawk. P. C. b.* 2. *c.* 46. *s.* 15.

Mode of taking depositions.] It is a general principle of evidence, that to render a deposition of any kind evidence against a party, it must appear to have been taken on oath, in a judicial proceeding, and that the party should have an opportunity to cross-examine the witness. *Per Hullock B., Attorney-General v. Davison, M'Cl. & Y.* 169. In order therefore to render a deposition admissible, it must appear, in the first place, that the requisitions of the statute have been complied with, otherwise the proceeding would be extra judicial. *See* 2 *Stark.* 211. (*n.*) 2 *Russ.* 660.

It must also be shown that the deposition was taken in the presence of the prisoner, and that he had an opportunity of cross-examination. Thus, where a woman had been mortally wounded, and a magistrate, at the request of the overseer of the parish, attended at the hospital where she lay, and in the absence of the prisoner, took her examination upon oath, which he committed to writing and signed, and which was signed by the woman also, who afterwards died; it was held that this examination was a voluntary and extra judicial act on the part of the magistrate, the prisoner not being before him, and having no opportunity of contradicting the facts it contained; but still that it was admissible as the declaration of the deceased, signed by herself, and was to be classed with the other confirmatory declarations which she made after she had received the mortal wounds, and before she died. *Woodcock's case*, 1 *Leach*, 500. In several other cases also depositions taken in the absence of the prisoner, have been rejected. *Dingler's case*, 2 *Leach*, 561. *Callaghan's case*, 33 *G.* 3. *M'Nally on Ev.* 385.

Where the prisoner was not present during the examination, until a certain part of the deposition marked with a cross, at which period he was introduced, and heard the remaining part of the examination, and when it was concluded, the whole was read over to him, Chambre J. said, that it was the intent of the statute, that the prisoner should be present whilst the witness actually delivers his testimony, so that he may know the precise words he uses, and observe, throughout, the manner and demeanour with which he gives his testimony. He therefore refused to admit that part of the depositions previous to the mark, which had not been heard by the prisoner. *Forbes's case*, *Holt*, 599. (*n.*) But a different rule was acted upon in the following case. The prisoner was indicted for murder, and the deposition of the deceased was offered in evidence. It appeared that a charge of assault having been preferred against the prisoner, the deposition of the deceased had been taken *on that charge*. The prisoner was not present when the examination commenced, but was brought into the room before the three last lines were taken down. The oath was again administered to the deceased in the prisoner's presence, and the whole of what had been written down was read over to him. The deceased was then asked in the presence of the prisoner, whether what had been written was true, and he said it was perfectly correct. The magistrates then, in the presence of the prisoner, proceeded to examine the deceased further, and the three last lines were added to the deposition. The prisoner was asked whether he chose to put any questions to the deceased, but did not do so. It was objected, 1st, that the prisoner had not been present, and 2dly, that the deposition was inadmissible, because the examination ought to be confined to the offence with which the

prisoner is charged at the time, which was an assault, and could not apply to the present charge of murder. The deposition, however, was admitted, and by a majority of the judges held rightly admitted. *Smith's case, Russ. & Ry.* 339. 2 *Stark.* 208. *S. C.*

Mode of taking depositions—signature.] The statute does not require that the deposition should be signed by the party deposing, and upon the former statutes of Philip & Mary, it was held that such a signature was unnecessary. *Flemming's case,* 2 *Leach,* 854. But *the magistrate* is required by the stat. 7 Geo. 4. c. 64. to subscribe the examinations and informations taken by him. *Vide supra.*

Mode of taking depositions—parol evidence not admissible to vary deposition.] The statute 7 Geo. 4. c. 64., requires that the depositions of the witnesses examined before a magistrate shall be taken in writing, and the presumption in all such cases is, that the magistrate has done his duty, and reduced it into writing. Parol evidence, therefore, of the deposition is inadmissible, unless it be clearly proved that it was not taken in writing. *Fearshire's case,* 1 *Leach,* 202, *ante, p.* 44. If taken in writing, parol evidence is inadmissible to vary it. *Thornton's case,* 1 *Phill. Ev.* 352. But as in the case of the *examination* of a prisoner, it has been decided, that where the magistrate did not hear, and consequently did not reduce into writing, a portion of the prisoner's confession, *Harris's case,* 1 *Moo. C. C.* 338, *ante p.* 46; so in the case of a *deposition,* parol evidence would, as it seems, under similar circumstances be admissible. *Sed vide* 1 *Phill. Ev.* 352. 2 *Russ.* 662.

Depositions admissible, on trial of other offence, than that with which the prisoner was charged.] The deposition of a witness since deceased, regularly taken under the statute, is admissible on the trial of an offence different from that with which the prisoner was charged at the time of the examination taken; as in *Smith's case, Russ. & Ry.* 339. *supra,* where the deposition was taken on a charge of assault, and given in evidence on a trial for murder. Nor is it necessary that the offence should be complete at the time of the deposition; thus where the examination of a party wounded is taken, if he afterwards die of his wounds, that deposition is admissible, on a trial for the murder. *Id. Radbourne's case,* 1 *Leach,* 458, 1 *East, P. C.* 356. *S. C.*

Depositions admissible to contradict the witness.] One of the objects of the legislature in requiring that the magistrate should take the deposition of the witnesses is, that the Court before which the prisoner is tried, may see whether those witnesses are consistent or contradictory in the evidence they give. *Vide*

Lambe's case, 2 *Leach*, 558. The deposition therefore may be used on the part of the prisoner to contradict the evidence of the witness given at the trial; *Strafford's case*, 3 *St. Tr.* 131. *fo. ed. Hawk. P. C. b.* 2. *c.* 46. § 22.; and where the name of the prisoner's mother was on the indictment, and the counsel for the prosecution declined to call her, upon which the judge ordered her to be examined, and finding her evidence differing from that she had given before the magistrate, directed the deposition to be read, the judges held this correct; and Lord Ellenborough and Mansfield, C. J., thought the prosecutor had a right to call for the depositions. *Oldroyd's case*, *Russ. & Ry.* 88. Whether under such circumstances the witness shall be examined, was ruled by Gaselee J. to be in the discretion of the judge. *Bodle's case*, 6 *C. & P.* 186. The prosecutor will not be allowed to call other witnesses to contradict him. *Ibid.*

Where there are several depositions.] Where several depositions had been taken before the magistrate, but one only was produced at the trial, Hullock B. refused to receive it, though it was the only one which was taken in writing. Those not produced, he said, might be in favour of the prisoner, and it would be unreasonable to allow the prosecutor to choose which he would produce. *Pearson's case*, *Lewin, C. C.* 97.

Depositions before the coroner.] It is enacted by the stat. 7 Geo. 4. c. 64. § 4. which repeals (as before stated) the stat. 1 & 2 Ph. & M. c. 13. that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessary to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessary to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the Court in which the trial is to be, before or at the opening of the Court.

Depositions taken before the coroner, are admissible in the same manner as depositions taken before a magistrate, where the witness is dead, or kept out of the way by the means or contrivance of the prisoner, or, as it is said, where he is unable to travel, or cannot be found. *Gilb. Ev.* 138. *Hawk. P. C. b.* 2. *c.* 46. § 15. 2 *Russ.* 661. *Vide ante, p.* 50. In one respect,

however, an important distinction has been taken between depositions before a magistrate, and those taken before the coroner; the latter, as it is alleged, being admissible, although the prisoner was not present when they were taken. This is stated in a book of reputation, *B. N. P.* 242, on the authority of two cases, *Bromwich's case*, 1 *Lev.* 180, *Thatcher* v. *Walter*, *T. Jones* 53.; *see also* 6 *How. St. Tr.* 776, 12 *Id.* 851, 13 *Id.* 591.; but it is observed by Mr. Starkie, 2 *Evid.* 278. 2*d ed.* that in neither of these cases was the question considered upon plain and broad principles. It was also said by Mr. Justice Buller, in *R.* v. *Eriswell*, 3 *T. R.* 707., that depositions taken before the coroner, in the absence of the prisoner, are admissible. It has been observed, however, that his lordship did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to *Radbourne's case*, 1 *Leach*, 512., as an authority, in which case the depositions were in fact taken *in the presence* of the prisoner. Lord Kenyon also in the same case, although he coincided in opinion with Buller J., appears to have considered that depositions before a magistrate and before a coroner, were on the same footing. 2 *Stark. Ev.* 278. 2*d ed.* The reasons given in support of the distinction are, that the coroner's inquest is a transaction of notoriety, to which every one has access, 2 *T. R.* 722., and that as the coroner is an officer appointed on behalf of the public, to make inquiry into matters within his jurisdiction, the law will presume the depositions before him, to have been duly and impartially taken. *B. N. P.* 242. Hotham B. is stated to have received depositions taken before the coroner, though it was objected, that the defendant had not been present. *Purefoy's case*, *Peake*, *Ev.* 68. 4*th ed.* And the general practice is said to be, to admit them without inquiry. *Archb. Cr. Law*, 134, 4*th ed.* So it is said to be the prevailing opinion, that depositions before a coroner, taken in the absence of the prisoner, are admissible; 1 *Phill. Ev.* 354.; but a writer of high reputation has stated, that the distinction between these depositions, and those taken before a magistrate, is not warranted by the legislature, and that as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration, whether it ought to be supported. 2 *Stark. Ev.* 278. 2*d ed.* And this opinion has been adopted by another text writer of eminence. 2 *Russ.* 661.

Depositions in India—by consent, &c.] By the 13 Geo. 3. c. 63. for establishing certain regulations for the better management of the affairs of the East India Company, in all cases of indictments or informations in the King's Bench, for misdemeanors or offences committed in India, that court may award

a mandamus to the judges of the supreme court, &c. who are to hold a court for the examination of witnesses, and receiving other proofs concerning the matters in such indictment or information; and the examination publicly taken in court shall be reduced to writing, and shall be returned to the court of King's Bench in the manner directed by the act, and shall be there allowed, and read, and deemed as good evidence, as if the witness had been present. *Sec.* 40. Depositions with regard to prosecutions for offences committed abroad by persons employed in the public service, are regulated by statute 42 G. 3. c. 85.

Depositions are sometimes taken by consent in criminal cases. *Morphew's case*, 2 *M. & S.* 602. *Anon.* 2 *Chitty*, 199. But these cannot be read if the witness is in this country. 2 *Russ.* 664.

PROOF OF NEGATIVE AVERMENTS.

General Rules 55
Where a fact is peculiarly within the knowledge of a Party 56

General Rules.] It is a general rule of evidence established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative. 1 *Phill. Ev.* 184. *B. N. P.* 298. But as this rule is not founded on any presumption of law in favour of the party, but is merely a rule of practice and convenience, it ceases in all cases where the presumption of law is thrown into the other scale. "Where the law," says Gilbert, C. B. "supposes the matter contained in the issue, there the opposite party must be put into the proof of it by a negative, as in the issue of *ne unques accouple in loyal matrimonie*, the law will suppose the affirmative without proof, because the law will not easily suppose any person to be criminal; and therefore, in this case the defendant must begin with the negative." *Gilb. Ev.* 145.

In general, therefore, as the law presumes that every person acts legally, and performs all the matters which he is by law required to perform, the party who charges another with the omission to do an act enjoined by law, must prove such omission, although it involves the proof a negative. Thus in an information against Lord Halifax for refusing to deliver up the

Rolls of the Auditor of the Exchequer, it was held that the plaintiff was bound to prove the negative, viz. that Lord Halifax did not deliver them, for a person shall be presumed duly to have executed his office till the contrary appear. *B. N. P.* 298. So in an action for the recovery of penalties under the Hawker's and Pedlar's Act, (29 G. 3. c. 26. s. 4.) against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, viz. of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. 1 *Phill. Ev.* 184.

Upon the same principle on the trial of an indictment under the 42 Geo. 3. c. 107. s. 1. (repealed,) which makes it felony to course deer in an inclosed ground, "without the consent of the owner of the deer;" it has been held that proof of the consent not having been given must come on the part of the prosecutor. *Rogers's case*, 2 *Camph.* 654. But in order to prove such want of consent it is not essential to call the owner himself. *Allen's case*, *Chamberlain's case*, 1 *Moo. C. C.* 154. *Hazy's case*, 2 *C. & P.* 458. Upon the same principle, where the issue is on the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting its illegitimacy to prove it; *Banbury Peerage case*, 2 *Selw. N. P.* 709; and where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it. *Ante, p.* 21.

Where a fact is peculiarly within the knowledge of a party.] But where a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law, will not render it incumbent upon the other side to prove the negative; but the party who must know the fact is put to the proof of it. Thus in the case of a conviction under the stat. 5 Ann. c. 14. s. 2. against a carrier having game in his possession, it was held sufficient that the qualifications required by the stat. 22 & 23 Car. 2. c. 25. were negatived in the information and adjudication, without negativing them in evidence. *Turner's case*, 5 *M. & S.* 206. So where, on a conviction for selling ale without a licence, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a licence; the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment. It was said by Abbott, C. J. that the party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas if the case is taken the other way, the informer is put to considerable inconvenience. *Harri-*

son's case, Paley on Convictions, 45. (*n.*) 2*d edit*. *See also Smith's case*, 3 *Burr*. 1476. The same rule has been frequently acted upon in civil cases. Thus on an action against a person for practising as an apothecary, without having obtained a certificate according to the 55 Geo. 3. c. 194., the proof of the certificate lies upon the defendant, and the plaintiff need not give any evidence of his practising without it. *Apoth. Comp. v. Bentley, R. & M. N. P. C.* 159.

EVIDENCE CONFINED TO THE ISSUE.

General Rule 57
Cases where Evidence of other transactions is admissible, as referable to the point in Issue . . 58
Acts and Declarations of Conspirators . . 60
Admissible for Prisoner as well as for Prosecution . 64
Cumulative offences . . . 66
Guilty knowledge 66
Intent 71
Evidence of character of the Prosecutor . . 72
Of the Prisoner 72

General Rule.] It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. In criminal proceedings it has been observed, (2 *Russ*. 694. 1 *Phill. Ev*. 166.) that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction, which forms the subject of the indictment, which alone, he can be expected to come prepared to answer.

Under this rule, therefore, it is not competent for the prosecutor to give evidence of facts, tending to prove another distinct offence, for the purpose of raising an inference that the prisoner has committed the offence in question. Thus, in treason, no overt act amounting to a distinct and independent charge, though falling under the same head of treason, can be given in evidence, unless it be expressly laid in the indictment; yet if it amounts to direct proof of any of the overt acts laid, it

may be given in evidence. *Foster*, 245. Upon the same ground it is not competent to the prosecutor to give evidence of the prisoner's tendency to commit the offence with which he is charged. Thus on a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, was held by all the judges to have been properly rejected. *Cole's case*, 1 *Phill. Ev.* 170.

Cases where evidence of other transactions is admissible as referable to the point in issue.] But where the evidence is referable to the point in issue, it will not be inadmissible, although it may incidentally apply to another person, or to another thing not included in the transaction in question, and with regard to whom, or to which, it is inadmissible. *See Willis v. Bernard*, 8 *Bingh.* 376. Thus although it is not material in general, and it is therefore inadmissible, to inquire into any other stealing of goods than that specified in the indictment, yet for the purpose of ascertaining the identity of the person, it is often important to show that other goods which have been upon an adjoining part of the premises, were stolen on the same night, and afterwards found in the possession of the prisoner. 1 *Phill. Ev.* 153. So on an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the firing, was afterwards discovered in the prisoner's possession. *Rickman's case*, 2 *East, P. C.* 1035. A case is cited by Lord Ellenborough, *in Whiley's case*, where a man committed three burglaries on one night, and stole a shirt at one place and left it at another, and they were all so connected, that the court heard the history of the three burglaries. *Whiley's case*, 2 *Leach*, 985, 1 *New Rep.* 92. *S. C.* Mr. Justice Heath, at the same trial, cited a case where several persons were indicted for a conspiracy to raise wages, and on the trial, evidence was received of circumstances which, taken by themselves, amounted to substantive felonies; but as those circumstances were material to the point in issue, they were admitted in evidence. *Id.* The prisoner was indicted for robbing the prosecutor, (by threatening to accuse him of an unnatural offence.) For the prosecution, evidence was given of a similar attempt on the following evening, when the prisoner brought with him a duplicate pawn ticket, for a coat, which he had obtained before. This evidence was objected to, as going to establish a distinct offence, but Holroyd, J. received it, (Wood, B. coinciding with him as to its admissibility) on the ground of its being offered as confirmatory of the truth of the prosecutor's evidence, as to the transactions of the former day, and as to the nature of those transactions. *Egerton's case, Russ. & Ry. C. C.* 376. Upon the same principle, viz. that the other acts were explanatory of the transaction in question, similar evidence was

admitted in the following case. The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings. The son of the prosecutrix suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was watched by him. On the first examination of the till, it contained 11*s.* 6*d.* The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when it was objected that this would be to prove several felonies. The objection being overruled, the prosecutrix's son proved, that upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction. *Ellis's case*, 6 *B. & C.* 145. Similar evidence was lately admitted in a case of robbery. The prisoners came with a mob to the prosecutor's house, and one of the mob went up to the prosecutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bonâ fide* advice to the prosecutor, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. Parke, J. having conferred with Vaughan, B. and Alderson, J. said, "We are of opinion, that what was done by the mob, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence." He afterwards stated that the judges (it was a special commission) had communicated with Lord Tenterden, who concurred with them in this opinion. *Winkworth's case*, 4 *C. & P.* 444. *See also Mogg's case*, 4 *C. & P.* 364.

On an indictment for burglary and larceny, it appearing that the prisoners might have been in the house before dark, and that nothing had been stolen at that time; the prosecutor proposed to give evidence of a larceny committed in the house by the prisoners previously, but the court rejected the evidence, the latter felony being a distinct transaction. *Vandercomb's case*, 2 *Leach*, 708. 2 *East, P. C.* 519. *S. C.*

Cases where evidence of other transactions is admissible as referable to the point in issue—acts and declarations of conspirators.] Not only, as in the cases before mentioned, may the acts and declarations of the prisoner himself on former occasions, be admitted when referable to the point in issue, but also the acts and declarations of other persons with whom he has conspired, may, if referable to the issue, be given in evidence against him.

In prosecutions for conspiracies, it is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any *act* done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law as well as in sound reason, the act of the whole party; and therefore the proof of the act will be evidence against any of the others who were engaged in the same general conspiracy, without regard to the question, whether the prisoner is proved to have been concerned in the particular transaction. 1 *Phill. Ev.* 88. Thus on the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent or disaffection, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of the defendant as connected with that general character, it is relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organised in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting, on a spot at some distance from the place of meeting, (from which spot, bodies of men came afterwards to the place of meeting) a great number of persons, so organized, had assembled, and had there conducted themselves in a riotous, disorderly, or seditious manner. *Hunt's case*, 3 *B. & A.* 573, 574.

Upon the same principle, on the trial of a similar indictment, it is relevant to produce in evidence, resolutions proposed by one of the defendants at a large assembly in another part of the country, for the same professed object and purpose as were avowed at the meeting in question; and also, that the defendant acted at both meetings as president or chairman; for in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. *Hunt's case*, 3 *B. & A.* 577.

The same rule is acted upon in cases of treason. If several persons agree to levy war, some in one place and some in another, and one party do actually appear in arms, this is a levying of war by all, as well those who were not in arms as those who were, if it were done in pursuance of the original

concert; for those who made the attempt were emboldened by the confidence inspired by the general concert, and, therefore, these particular acts are in justice imputable to all the rest. 1 *East, P. C.* 97. *Kel.* 19. 3 *Inst.* 9. "But, suppose," says Mr. East, "a conspiracy to levy war, and a plan of operations settled, and those to whom the execution of them is committed afterwards see occasion to vary in certain particulars from the original plan, which is accordingly done, unknown to some of the conspirators; yet I conceive," he adds, "that if the new measures were conducive to the same end, and that in substance the original conspiracy were pursued, they all remain responsible for each other's acts." 1 *East, P. C.* 98. *Vide post, title Accessories, and Murder.*

Letters and *writings* also of one of several conspirators are frequently offered in evidence against others. In *Stone's case*, (for high treason) evidence having been given to connect the prisoner with one Jackson, and to show that they were engaged in a conspiracy to transmit to the French an account of the disposition of the English, in case of an invasion, the Secretary of State was called to prove that a letter of Jackson's, containing treasonable information of the state of this country, had been transmitted to him from abroad. The evidence was objected to, as the letter was not proved to have come to the prisoner's hands. But the court admitted it, on the authority of *Tooke's case* and *Hardy's case*, the acts of Jackson done in pursuance of the conspiracy, being, in contemplation of law, the acts of the prisoner. *Stone's case*, 1 *East, P. C.* 99. 6 *T. R.* 527. 25 *How. St. Tr.* 1311. *S. C.*

Papers found in the custody of the prisoner are admissible in evidence, without any proof of the handwriting being his. 1 *East, P. C.* 119. *Layer's case*, 6 *St. Tr.* 279.

The letters or writings must appear to have been written in furtherance of the conspiracy, and not as a mere relation of a past transaction. On the trial of Hardy, a letter from Thelwall to a third person, not connected with the conspiracy, was offered in evidence, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which the prisoner and the writer were proved to be members. It being objected that the letter was merely a relation by the writer, the majority of the court decided against the admissibility of the letter. They considered the letter not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said Eyre, C. J. "very often makes a part of the transaction, and in that case the correspondence of one who is a party to the conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what has been

done, appears a different thing." *Hardy's case*, 24 *How. St. Tr.* 452. 475.

It is not necessary, in order to render the letter of one of several conspirators evidence, that it should ever have reached the hands of the person to whom it was addressed. Thus, in *Stone's case, supra, p.* 61, the letter which was read in evidence had been intercepted; and in Hardy's case, a letter written by the chairman of a meeting in London, to a delegate sent by that meeting into Holland, though never received by that person, was allowed to be read in evidence, on the ground that it was a letter written by one conspirator to another conspirator, and having relation to the conspiracy, the tendency and nature of which it contributed to show. *Hardy's case*, 24 *How. St. Tr.* 453. 477.

With regard to the *time* and *place* of finding such letters or writings, it is obvious that they ought to be such as to afford a presumption that the documents are genuine. Where, after the prisoners had been apprehended, several letters directed to them were intercepted at the post office, and were attempted to be given in evidence against them at the trial, the court said, that as they had never been in the custody of the prisoners, or any way adopted by them, they were inadmissible. *Hevey's case*, 1 *Leach*, 235. In Hardy's case it was proposed to give in evidence certain writings found subsequently to the apprehension of the prisoner, in the possession of Martin and Thelwall, persons charged with the same conspiracy; but it was held that as there was no evidence to show the existence of the writings previous to the prisoner's apprehension, or that he was a party to them, they could not be read. *Hardy's case*, 24 *How. St. Tr.* 452. But if there be a presumption of the previous existence of the writing, it will then be admissible. On the trial of Watson for high treason, proof was admitted of papers found in the lodgings of Watson the younger, who had been engaged in the conspiracy, after the apprehension of the prisoner, and a witness stated that similar papers had been shewn to him. *Hardy's case* having been cited by the counsel for the prisoner, the court were clearly of opinion that these writings were admissible, since, in the first place, there was a strong presumption that the papers found in the room were there previously to the apprehension of the prisoner, a circumstance which very materially distinguished this case from that of Hardy, where the papers were found in the possession of persons after his apprehension, which persons might have acquired the possession after his apprehension; whereas, in the present case, the room in which the papers were found had been kept locked up by one of the conspirators; and, secondly, because these papers had all a reference to the design and plan of the conspiracy as detailed in evidence. *Watson's case*, 2 *Stark.* 140.

In the same case evidence was given by Castles, an accomplice, that a quantity of pikes, made in furtherance of the conspiracy, had been carried to the lodgings of the younger Watson, and that this was communicated to the elder Watson. The latter was apprehended on the 2d December, and the pikes were not discovered until the 5th of March. It was objected that the evidence of the discovery of the pikes being after the prisoner's apprehension, ought not to be received; and *Hardy's case* was cited. But the court was clearly of opinion that it was admissible. In the case cited, what was offered to be produced in evidence did not exist before the apprehension, but here the thing not only existed, but had been carried to the house by two of those who had been stated to be parties to the transaction. *Watson's case*, 2 *Stark.* 137.

Where letters and writings are offered in evidence, in these cases, it must appear that they are connected with the objects of the conspiracy, and that they are not merely the speculative opinions of the party by whom they were written. But if they be so connected, then though they may never have been published, they are admissible in evidence. In *Sidney's case*, 9 *How. St. Tr.* 817., writings composed several years before the offence with which the prisoner was charged, and never published, were allowed to be read in evidence against him, a course clearly illegal; "but I freely admit," says Mr. Justice Foster, "that had the papers found in Mr. Sidney's closet, been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published." *Foster*, 198. 4 *Black. Com.* 80. 1 *East, P. C.* 119. In *Watson's case*, a paper containing questions and answers, found in the lodgings of the younger Watson, and tending to corrupt the soldiers, was offered in evidence; but the reception of this evidence was objected to, and *Sidney's case* was cited. Lord Ellenborough observed that where a doubt existed, his inclination was to reject a paper offered against a defendant in such a case. That if there had been proof of a design to corrupt the soldiers by written papers circulated amongst them, this would have been evidence of a paper to effectuate that purpose; but that the contents of the paper appeared to be of too abstract a nature, and too little connected with any of the objects of the conspiracy, then in evidence. Abbott J. distinguished *Sidney's case*. The paper there was not only then an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. He entertained considerable doubt upon the present question, but his opinion was that the paper was too abstract in its terms to be admissible. *Watson's case*, 2 *Stark.* 145.

Not only are the *acts*, and the written *letters* and *papers*, of one of several persons engaged in the same conspiracy, evidence

against the others, if done or written in furtherance of the common purpose, but his verbal declarations are equally admissible under similar restrictions. Any declarations made by one of the party in pursuance of the common object of the conspiracy, are evidence against the rest of the party, who are as much responsible for all that has been said or done by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice, or executed by their own hand. These declarations are of the nature of acts; they are in reality, acts done by the party, and generally they are far more mischievous than acts which consist only in corporal agency. All consultations therefore carried on by one conspirator, relative to the general design, and all conversations in his presence, are evidence against another conspirator, though absent. 1 *Phill. Ev.* 89. The effect of such evidence must depend on a variety of circumstances, such as whether the party was attending to the conversation, and whether he approved or disapproved; still such conversations are admissible in evidence. *Per Eyre C. J. Hardy's case,* 24 *How. St. Tr.* 704. In *Lord George Gordon's case* the cry of the mob, being part of the transaction, was held to be admissible against the prisoner. 21 *How. St. Tr.* 535.

Cases where evidence of other transactions is admissible as to the point in issue—admissible for prisoner as well as for prosecution.] Evidence of other acts and declarations of the prisoner, as it is admissible for the prosecution, under the restrictions above stated, so it is also admissible on behalf of the prisoner. On a charge of murder, for instance, expressions of good will, and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased; from which the jury may be led to conclude that his intention could not have been what the charge imputes. 1 *Phill. Ev.* 166. So on the trial of an information against the proprietor of a newspaper, for a seditious libel, Lord Ellenborough ruled that the defendant had a right to have any parts of the same paper, upon the same topic with the libel, or fairly connected with it, read, although locally disjoined from the libel. Passages, his lordship observed, of the same paper, tending to show the intention and mind of the defendant with respect to the specific paragraph, must be very material for the consideration of the jury. *Lambert's case,* 2 *Campb.* 398.

As, in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to be held in pursuance of the conspiracy, is admissible in evidence on the part of the prosecution against him; so on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved on his behalf; for the intention and design of a party

at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. 1 *Phill. Ev.* 176. On the trial of an indictment for a conspiracy to overthrow the government, evidence was given to show that the conspiracy was brought into overt act, at meetings, in the presence of the prisoner Walker. His counsel was allowed to ask, whether at those times he had heard Walker utter any word inconsistent with the duty of a good subject. He was also allowed to inquire into the general declarations of the prisoner at the meetings, and whether the witness had heard him say any thing that had a tendency to disturb the peace. *Ibid.* 23 *How. St. Tr.* 1131. 31 *Id.* 43.

The acts and declarations of a prisoner, given in evidence in his favour, ought to be connected both in point of subject matter, and of time, with the acts or declarations proved against him. *See* 1 *Phill. Ev.* 172. In the two following cases, however, great latitude was allowed on a trial for high treason. Where the overt act charged was, that the prisoner, to compass the king's death, conspired with others to call a convention of the people, &c.; the prisoner's counsel was allowed to ask the witness whether, *before the time of the convention*, he had ever heard from the prisoner what his objects were, and whether he had at all mixed himself in the business. *Hardy's case*, 24 *How. St. Tr.* 1097. So in *Horne Tooke's case*, 1 *East, P. C.* 61, 25 *How. St. Tr.* 545, evidence having been given on the part of the crown, of several publications containing republican doctrines and opinions, which had been distributed by the prisoner during the period assigned in the indictment, (for high treason) for the existence of the conspiracy, the prisoner offered to put in a book, written by him, expressive of his veneration for the king and constitution; this was objected to, as being antecedent to the period of the conspiracy, and not relating to the particular transaction. After argument, the book was admitted, on the ground that it had reference to the proof given in support of the charge, to rebut the idea, that a reform in parliament was a pretence made by the prisoner, and that his real object was to overturn the government. The soundness of this decision has been doubted by Lord Ellenborough, who said, that if the point should ever occur before him, it would become his duty seriously to consider whether such evidence should be admitted. *Lambert's case*, 2 *Campb.* 409. In the following cases a more strict limit was placed to the investigation of the acts and declarations of a prisoner. On the trial of Lord George Gordon, a witness was asked by his counsel, on cross-examination, as to a statement made by the prisoner on *the night before the meeting*, in St. George's Fields, and with respect to which, such evidence had been produced. The question was overruled, and Lord Mansfield said, that as the counsel for the

crown had given evidence of what the prisoner said at the meeting, on the 29th of May, the counsel for the prisoner might show the whole connection of what the prisoner said, besides, at that meeting; but that they could not go into evidence of what he said on an antecedent day. 21 *How. St. Tr.* 542. So in *Hanson's case*, on the charge of promoting a riot, the prisoner's counsel was not allowed to prove what he had said privately to a friend, previously to his going to the place of riot, respecting his motives in going thither. 31 *How. St. Tr.* 1281.

On the trial of an indictment for a conspiracy to defraud, the written correspondence of the defendant, with another of the conspirators relating to the transaction in question, was allowed to be read, in order to show that the defendant was deceived by his correspondent, and was not a participator in the fraud. *Per* Best J. "I think them admissible; for what the parties say at the time is evidence to show how they acted." *Whitehead's case*, 1 *C. & P.* 67.

Cases where evidence of other transactions is admissible as referable to the point in issue—cumulative offences.] Where the offence is a cumulative one, consisting, itself, in the commission of a number of acts, evidence of those various acts so far from being inadmissible, is essential to the proof of the charge. Thus on an indictment against the defendant for a conspiracy, to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen; after proof of a representation to one tradesman, evidence was offered of a representation to another tradesman at a different time, and admitted by Lord Ellenborough, who said that cumulative instances were necessary to prove the offence, and that the same sort of evidence was allowed on an indictment for barratry. *Roberts's case*, 1 *Campb.* 399.

Cases where evidence of other transactions is admissible, as referable to the point in issue—guilty knowledge.] In various cases it is necessary to prove a guilty knowledge in the prisoner, with regard to the transaction in question; and for this purpose evidence may be given of circumstances not connected with the particular offence, in order to raise a presumption of a guilty knowledge in the prisoner at the time of the offence committed. On this ground evidence of other offences of the same kind, committed by the prisoner, though not charged in the indictment, is admissible against him.

This evidence most commonly occurs in cases of indictments for uttering forged instruments, knowing them to be forged, and false coin, knowing it to be counterfeit, in which the guilty knowledge is the principal ingredient of the offence. The prisoner was charged with uttering a bank of England note,

knowing it to be forged; evidence was offered for the prosecution, that the prisoner had uttered another forged note in the same manner, by the same hand, and with the same materials, three months preceding, and that two ten pound notes and thirteen one pound notes of the same fabrication, had been found on the files of the company, on the back of which there was the prisoner's handwriting, but it did not appear when the company received them. This evidence was admitted, but the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation, as to the weight of it, which would be more or less considerable, according to the number of the notes, the distance of time at which they had been put off, and the situation of life of the prisoner, so as to make it more or less probable, that so many notes could pass through his hands in the course of business. *Ball's case, Russ. & Ry.* 132, 1 *Camph.* 324. *S. C.* The prisoners were indicted for uttering bank notes, knowing them to be forged. The trial took place in April, and to prove their guilty knowledge, evidence was given, that in February they had uttered, on three several occasions, forged bank notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses; and the court was of opinion that this evidence was admissible. Lord Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanor of the prisoner on other occasions, from which it might fairly be inferred that the prisoner was conscious of his guilt, whilst he was doing the act charged upon him in the indictment. Heath, J. said, "the charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." *Whiley's case,* 2 *Leach,* 983, 1 *New Rep.* 92. *S. C.*

Not only is evidence of the act of passing other forged notes admissible to prove the prisoner's guilty knowledge, but proof of his general demeanor on a former occasion will be received for the same purpose. The prisoner was indicted for forging and knowingly uttering a bank note, and the question was, whether the prosecutor, in order to show that the prisoner knew it to be forged, might give the conduct of the prisoner in evidence, that is, whether from the conduct of the prisoner on one occasion, the jury might not infer his knowledge on another, and all the judges were of opinion that such evidence ought to be received. *Tattershall's case, cited by Lord Ellenborough,* 2 *Leach,* 984.

How far it is necessary that the other forged notes should be of the same description and denomination as the note in question, does not appear to be well settled. The prisoner was in-

dicted for uttering on the 27th November, 1812, a 5*l.* Bank of England note, knowing it to be forged. To show the guilty knowledge, it was proved, that about six weeks previously to the time in question, the prisoner had tendered a 1*l.* Leicester Bank note, which was supposed to be forged, but was not produced on the trial; that on the 4th July, 1812, he passed a forged 2*l.* Bank of England note, (which was produced); that at the latter end of November 1812, he tendered a 5*l.* Bank note, supposed to be forged, but not produced at the trial; and that again in November, he paid away a 2*l.* Bank note, (not produced) but supposed to be forged; being convicted, the opinion of the judges was taken on this evidence, and they held, that as evidence had been left to the jury as of *forged* notes, which were not proved to have been forged, the prisoner should be recommended to mercy. Some of the judges seemed to think, that if these bills had been clearly proved to be forged bills, yet being bills of a different description and denomination from that on which the prisoner had been indicted, they ought not to have been given in evidence; and some of their lordships seemed to doubt, whether the distance of time was not too great. At the conclusion of the report of this case, it is said, *quære*, whether these are not chiefly subjects of observation. *Millard's case, Russ. & Ry.* 245. The prisoner was indicted for uttering a forged 5*l.* Bank of Ireland note. To show guilty knowledge, it was proposed to give in evidence the uttering by the prisoner of two forged notes of the bank of Messrs. Ball & Co., bankers in Dublin. This evidence being objected to, on the ground, that the notes were of a different description, Littledale J. without hesitation overruled the objection, and the prisoner was convicted. *Kirkwood's case, Lewin, C. C.* 103, *and see Hodgson's case, Id.* 103, *post, p.* 69.

It appears, that by the Scotch law, evidence of other forged notes is admissible, though they be not of the same description as those forged. "The most important circumstance," says an eminent writer on the criminal law of Scotland, "and which is generally *per se*, decisive as to guilty knowledge, is if other forged notes are found on the prisoner. If four or five forged notes, and especially forgeries on the same bank with that uttered, are found on the prisoner, it is hardly possible to form any other conclusion, than that he is a dealer in these dangerous instruments, caught in the very act of disposing of them. This will amount to a moral certainty of the other forged concealed in his possession, as in his hat, in a concealed pocket, sewed between his coat and the lining, or the like. On the other hand, the weight of this circumstance, always great, must be diminished, if the notes found on him were nowise concealed, and were exhibited by him without any suspicious circumstances or appearance of conscious guilt." *Alison on the Princ. of the Cr. Law of Scotland*, 420.

Though evidence of the uttering of other forged notes may be given to show guilty knowledge, yet what was said at another time by the prisoner respecting those utterings, is inadmissible. Where evidence to this effect was tendered, Bayley J. stopped it, and said, "the prosecutor is at liberty to shew other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them. But what he said or did at another time, collateral to such other utterings, could not be given in evidence; as it was impossible that the prisoner could be prepared to contradict it." *Phillipp's case, Lewin, C. C.* 105.

Whether, where the other forged note, the issuing or possession of which is proposed to be given in evidence, in proof of guilty knowledge, is the subject, at the time, of another indictment, it is admissible in evidence, does not appear to be well settled; though upon principle there appears to be no objection to the reception of such evidence. In one case where such evidence was tendered, Vaughan B. refused to receive it; *Smith's case*, 2 *C. & P.* 633.: but in another case where the objection was taken, Littledale J. without hesitation overruled it, and the prisoner was convicted. *Kirkwood's case, Lewin, C. C.* 103. Where the prisoner was indicted for uttering forged notes of the Edinburgh Bank, and it was proposed to give in evidence the uttering by the prisoner of certain forged notes of the Paisley bank, (which formed the subject of a separate prosecution) to shew guilty knowledge, Hullock B. said, that he had great doubts as to the admissibility of the evidence, observing, that if the prisoner had been indicted for uttering the Edinburgh notes only, there would have been no doubt. His own opinion was in favour of receiving the evidence, but many of the judges had great doubts about it. *Hodgson's case, Lewin, C. C.* 103.

The *possession* also of other forged notes by the prisoner, is evidence of his guilty knowledge. The prisoner was indicted for uttering a bill of exchange upon Sir James Esdaile & Co., knowing it to be forged. It was proved, that when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same parties; on a case reserved, the judges were all of opinion that these forged bills found upon the prisoner at his apprehension, were evidence of his guilty knowledge. *Hough's case, Russ. & Ry.* 121. In order however to render such evidence admissible, it must be proved in the regular manner, that the other notes were forged. *Millard's case, Russ. & Ry.* 245. *ante, p.* 68.

On the trial of indictments for uttering or putting off counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment. 1 *Russ.* 85. 2 *Russ.* 697. In *Whiley's case*, (*see ante, p.* 67.) it was stated by the counsel

for the prisoner, in argument, that upon an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment. Upon this Thompson B. observed, "as to the case put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." 2 *Leach*, 986.

With regard to the guilty knowledge of a receiver of stolen goods, it is laid down, that buying the goods at a lower value than they are worth, is presumptive evidence that the buyer knew they were stolen. 1 *Hale, P. C.* 216. 2 *East, P. C.* 765. Where upon an indictment for receiving, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times; the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury that they might take into their consideration the circumstance of the prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether when she received the articles, for which the prosecutor elected to proceed, she knew them to have been stolen. *Dunn's case*, 1 *Moody, C. C.* 15).

Where evidence is given of collateral circumstances to show the prisoner's guilty knowledge, it must appear that those circumstances occurred previously to the commission of the offence with which he is charged. Thus on an indictment for forging a bank note, a letter purporting to come from the prisoner's brother, and left by the postman, pursuant to the direction, at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, cannot be read in evidence against him. *Huet's case*, 2 *Leach*, 820. So on an indictment for uttering a forged bank note, to show the guilty knowledge, the prosecutors offered to prove the uttering of another forged note five weeks *after* the uttering, which was the subject of the indictment; but the court (Ellenborough, C. J., Thompson, C. B., and Lawrence J.) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the same manufacture. *Taverner's case, Carr. Sup.* 195, 1*st ed.* 4 *C. & P.* 413. (*n*) *S. C.* How-

ever, on an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange precisely similar, with the same drawers' and acceptors' names, uttered by the prisoner, about a month after the uttering of the bill mentioned in the indictment, Mr. Justice Gaselee, after consulting Alexander, C. B. was disposed to allow the evidence to be received; but said that he would reserve the point for the opinion of the judges; upon which the counsel for the prosecution declined to press the evidence. *Smith's case*, 4 *C. & P.* 411.

Cases where evidence of other transactions is admissible when referable to the point in issue—questions of intent.] As evidence of other facts is admissible when those facts tend to prove the point in issue, as to show the identity, or to establish the proximity of the prisoner at the time in question, (*vide supra*;) so where the *intent* of the prisoner forms part of the matter in issue, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the prisoner in committing the act in question. Thus on an indictment for maliciously shooting, evidence was given that the prisoner, about a quarter of an hour before the shooting with which he was charged, intentionally shot at the prosecutor. It was suggested that this was evidence of two distinct felonies; but Mr. Justice Burrough said it was unavoidable in this case, as it seemed to him to be one continued transaction in the prosecution of the malicious intent of the prisoner; and the judges held that the evidence was rightly admitted. *Voke's case*, *Russ. & Ry.* 531.

So on a charge of sending a threatening letter, other letters written by the prisoner, both before and after that in question, may be read in evidence as serving to explain the letter upon which he is indicted. *Robinson's case*, 2 *East, P. C.* 1110, 2 *Leach*, 749. *S. C.* Upon the same principle in actions for libels or words, evidence of other libels or words may be given to show the *animus* of the defendant, whether the words be spoken before or after those in question. *Charlton v. Barrett*, *Peake*, 22. *Rustell v. Macquister*, 1 *Camp.* 49 (*n.*)

So the *declarations* of a prisoner made at a former time are admissible, where they tend to prove the intent of the party at the time of the commission of the offence. Thus on an indictment for murder, evidence of former grudges and antecedent menaces may be given to show the prisoner's malice against the deceased. 1 *Phill. Ev.* 169. So in treason, what was said by the prisoner with respect to what was passing at the time of the transaction laid as the overt act, may be received in evidence to explain his conduct, and to show the nature and object of the transaction. *Watson's case*, 2 *Stark.* 134.

Evidence of the character of the prosecutor.] Where the prosecutor appears as one of the witnesses, evidence of his character, with regard to veracity, will be admitted as in the case of other witnesses. *Vide post.* And in some particular cases, where the character of the prosecutor is mingled with the transaction in question, it forms a point material to the issue, and may consequently be inquired into. Thus in the case of an indictment for a rape, evidence that the woman had a bad character previously to the commission of the offence, is admissible; and the same principles apply with regard to an indictment for an assault with intent to commit a rape. *Clarke's case*, 2 *Stark.* 244. 1 *Phill. Ev.* 165. But in these cases *general* evidence of character only is admissible, and not evidence of particular facts. *Id.* Thus where on an indictment for a rape the prosecutrix was asked whether she had not before had connexion with other persons; and with a particular person named? The judges held that the witness was not bound to answer these questions, as they tended to criminate and disgrace herself; and evidence having been offered to prove that the prosecutrix had had connexion with a man before this charge, the judges also determined that this evidence was properly rejected. *Hodgson's case, Russ. and Ry.* 211. But evidence is admissible that the prosecutrix had formerly been connected with the prisoner. 2 *Stark. Ev.* 216. 2*d edit. citing Hodgson's case, supra; and a case cor. Wood B., York Summer Assizes*, 1812.

Where, on the trial of an indictment for an assault, with intent to commit a rape, the prosecutrix was asked, on cross-examination, whether she had not been twice in the House of Correction many years ago, and she admitted that she had, it was held by Holroyd, J. that a witness might be examined on behalf of the prosecution as to her situation and conduct since, in order to repel the inference which might be drawn from her former misconduct. *Clarke's case*, 2 *Stark.* 241.

Evidence of the character of the prisoner.] In trials for high treason, for felony, and for misdemeanors, (where the direct object of the prosecution is to punish the offence), the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be entitled to great weight. 1 *Phill. Ev.* 165. The rule does not extend to actions or informations for penalties, as to an information for keeping false weights. *Attorney General v. Bowman*, 2 *Bos. & Pul.* 532. (*n.*) To admit such evidence in that case would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but where the prosecution is not directly for the crime, but for the penalty, it is not. If evidence of character were admissible in such a case as this, it would be necessary to try

character in every charge of fraud upon the excise and custom-house laws. *Per Eyre, C. J. Ibid.* The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the charge against him. On a charge for stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The inquiry must also be as to the *general* character, for it is the general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest, unworthy part. 1 *Phill. Ev.* 166. It frequently happens that witnesses, speaking of the general opinion of the prisoner's character, state their own personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character. *Id.*

It has been usual, says a very sensible writer, to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the prisoner, character, however excellent, is no subject for their consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted, with deference, that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he has been called upon to answer. 2 *Russ.* 703.

The prosecutor cannot enter into evidence of the defendant's bad character, unless the latter enable him to do so, by calling witnesses in support of his good character, and even then, the prosecutor cannot examine as to particular facts. *B. N. P.* 296. *Hurd v. Martin, Cowp.* 331.

SUBSTANCE OF THE ISSUE TO BE PROVED.

General rule 74
Divisible Averments 74
Sufficient to prove what constitutes an offence . 74
Intent 77
Descriptive Averments 77
The property stolen or injured . . 77
The name of the prosecutor or party injured . 79
Rule of idem sonans 81
The name of third persons mentioned in the indictment 82
The mode of committing offences . . . 83
Averments not material . . . 84
Averments as to time 84
Averments as to place 85
Averments as to value 86

General rule.] Under the present head will be considered the *quantity* of evidence required in support of particular averments in indictments, and consequent thereupon, the doctrine of variances. Upon the latter subject it is said by Lord Mansfield, that greater strictness is required in criminal prosecutions than in civil cases; and that in the former a defendant is allowed to take advantage of nicer exceptions. *Beech's case*, 1 *Leach*, 134. It may, however, be doubted, whether this distinction is grounded upon sound principles, and whether in this respect, as in others, the rules of evidence ought not to be acted upon in the same manner both in civil and criminal proceedings.

The greater number of the cases on this subject may be classed under the two heads of divisible and descriptive averments.

Divisible averments—sufficient to prove what constitutes an offence.] It is a distinction which runs through the whole criminal law, that it is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. *Per Lord Ellenborough, Hunt's case*, 2 *Campb.* 585. The offence, however, of which he is convicted must be of the same class with that with which he is charged. Thus, upon an indictment for a felony, in stealing a parchment, it appearing that it concerned the realty, and

that the prisoner could not, therefore, be convicted of the felony, it was urged that he might receive judgment as for a trespass, and for this the *Year Book*, 2 *H.* 7. 10 & 22, *Cro. Car.* 332, *Kel.* 29, *Cro. Jac.* 497, 1 *And.* 351, *and Dalt.* 321, were cited, but the court, having observed upon these cases, and shown that they were repugnant to the rules of law and the principles of justice, directed the prisoner to be discharged. *Westbeer's case*, 1 *Leach*, 14. 2 *Str.* 1133. *S. C.*

Upon an indictment for *petit treason*, if the killing with malice was proved, but not with such circumstances as to render the offence petit treason, the prisoner might still have been found guilty of wilful murder upon that indictment. *Swan's case*, *Foster*, 104. So upon an indictment for *murder*, the prisoner may be convicted of manslaughter, for the indictment contains an allegation of manslaughter. *Gilb. Ev.* 269. *Macalley's case*, 9 *Rep.* 67. *b. Co. Litt.* 282. *a.* And where a man was indicted on the statute 1 Jac. 1. for stabbing, *contra formam statuti*, it was held that the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. *Harwood's case*, *Style*, 86. 2 *Hale*, *P. C.* 302.

Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony, and acquit him of the burglary. 2 *Hale*, *P. C.* 302. So where the indictment was for a burglary and larceny, and the jury found the prisoner guilty of stealing to the amount of 40s., in a dwelling house, (12 Ann. c. 7. repealed by 7 & 8 G. 4. c. 27.) the judges were of opinion that by this verdict the prisoners were ousted of their clergy, the indictment containing every charge that was required by the statute. *Withal's case*, 1 *Leach*, 88, 2 *East*, *P. C.* 515, *stated post*. So on an indictment for stealing in a dwelling house, persons therein being put in fear, the prisoner may be convicted of the simple larceny. *Etherington's case*, 2 *Leach*, 671. 2 *East*, *P. C.* 635. *stated post*.

Again, if a man be indicted for robbery, he may be found guilty of the larceny, and not guilty of the robbery. 2 *Hale*, *P. C.* 302. And in all cases of larceny, where, by statute, circumstances of aggravation subject the offender to a higher punishment, on failure in the proof of those circumstances, the prisoner may be convicted of the simple larceny. Thus on an indictment for horse stealing, the prisoner may be found guilty of a simple larceny. *Beaney's case*, *Russ. & Ry.* 416. But where upon an indictment for robbery from the person, a *special verdict* was found, stating facts, which in judgment of law, did not amount to a taking from the person, but showed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, whether the prisoners were or were not guilty of the felony or robbery charged against them in the indictment, the judges thought that judgment as for larceny could not be given upon that indictment, but remanded the pri-

soners to be tried upon another indictment. *Frances's case*, 2 *East*, *P. C.* 784.

In misdemeanors, as well as in felonies, the averments of the offence are divisible. Thus in an information for a libel, it was stated that the defendants *composed*, *printed*, *and published* the libel, the proof extended only to the publication, but Lord Ellenborough held this to be sufficient. *Hunt's case*, 2 *Campb.* 584.

Where an indictment charges that the defendant *did*, *and caused to be done* a certain act, as *forged and caused to be forged*, it is sufficient to prove either one or the other. *Per Lord Mansfield*, *Middlehurst's case*, 1 *Burr.* 400. *Per Lord Ellenborough*, *Hunt's case*, 2 *Campb.* 585.

With regard to the value and extent of the property upon which the offence has been committed, the averments in the indictment are divisible. Thus if a man be indicted for stealing goods of the value of ten shillings, the jury may find him guilty of stealing goods to the value of sixpence, and where the distinction between grand and petty larceny existed, this would have rendered the prisoner guilty of the latter only, though charged with the former. 2 *Hale*, *P. C.* 302. Whatever quantity of articles may be stated in an indictment for larceny to have been stolen, the prisoner may be convicted if any one of those articles be proved to have been feloniously taken away by him. Where the prisoner was indicted under the 7 Geo. 3. c. 50. for that he being a post boy and rider, employed in the business of the post office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*; the prisoner being convicted, it was held by the judges that the statement in the indictment not being descriptive of the letter, but of the offence, the conviction was right. *Ellins's case*, *Russ. & Ry.* 188. So upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part, is sufficient. *Hill's case*, *Russ. & Ry.* 190. In the same manner upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *Per Holt J.* 1 *Lord Raym.* 149. So upon an indictment on the 9 Ann. c. 14. s. 5. for winning more than 10*l.* at one sitting, Lord Ellenborough held that the defendant might be convicted of winning a less sum than that stated in the indictment, though it would have been otherwise if the prosecutor had averred that the defendant had won bills of exchange of a specified amount. *Hill's case*, 1 *Stark.* 359.

Where in an indictment for embezzling, it was averred that the prisoner had embezzled divers, to wit, two bank notes for

one pound each, and one bank note for two pounds, and the evidence was that he had embezzled one pound notes only, this was held sufficient. *Carson's case, Russ. & Ry.* 303.

Divisible averments—intent.] Where the *intent* of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only. Thus, on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley J. informed the jury, that if they were of opinion that the defendant had published the libel, with *either* of those intentions, they ought to find him guilty. *Evans's case* 3 *Stark.* 35. So where the indictment charged the prisoner with having assaulted a female child, with intent to abuse, and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention carnally to know her; Holroyd J. held, that the averment of intention was divisible, and the prisoner received sentence of imprisonment for twelve months. *Dawson's case,* 3 *Stark.* 62.

Descriptive averments—the property stolen or injured.] Where a person or a thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same as that described in the indictment.

With regard to the thing upon which the offence is alleged to have been committed, if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. 3 *Stark. Ev.* 1531. 1*st ed.* The prisoner was indicted for stealing four live tame turkeys. It appeared that he stole them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried. The judges held that the word *live* in the description, could not be rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd J. observed, that an indictment for stealing a dead animal, should state that it was dead; for upon a general statement, that a party stole the animal, it is to be intended that he stole it alive. *Edwards's case, Russ. & Ry.* 497.

The following cases have occurred of variances in the description of animals. On an indictment upon the statute 15 *Geo.* 2. c. 34., which mentions both *cows* and *heifers*, it was

held, that a beast two years and a half old, which had never had a calf, was wrongly described as a cow. *Cook's case*, 2 *East, P. C.* 616, 1 *Leach* 105. On an indictment for stealing two *colts*, it appeared that the one was a *mare* four years old, and the other a yearling mare or *filly*. The witnesses said, that animals of this description, when as young as those in question were, according to the usual language of the country called *colts*, and some of the jurors said that *mares* or *fillies* are generally called *colts*, until they are three or four years old. The prisoner being convicted of the simple larceny, the judges were unanimously of opinion, that the conviction for simple larceny was correct, but as *colts* were not mentioned *eo nomine* in the statute (1 Ed. 6. c. 12., 2 Ed. 6. c. 33.) the judges could not take notice that they were of the horse species, and consequently clergy was not taken away. *Beaney's case*, *Russ. & Ry.* 416. The prisoner being indicted under the 9 Geo. 1. c. 22., for killing "certain cattle, to wit, one *mare*;" the evidence was, that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges on a case reserved, were of opinion, that the words, "a certain mare," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed, being a *colt*, generally without specifying its sex, was not sufficient to support a charge of killing a *mare*. *Chalkley's case*, *Russ. & Ry.* 258.

Where a statute mentions only the grown animal, the young is included, and it is no variance to describe the young animal as if it had been the grown animal. Thus, upon an indictment on the 2 & 3 Ed. 6., which mentions the words "horses, geldings, and mares," it was held that foals and fillies were included in those words, and that evidence of stealing a mare filly, supported an indictment for stealing a mare. *Welland's case*, *Russ. & Ry.* 494. But where the statute (15 Geo. 2. c. 34., and see 7 & 8 Geo. 4. c. 29. § 24.) specified *lambs* as well as sheep, and the indictment was for stealing *sheep*, proof that they were lambs, was held to be a variance. *Loom's case*, 1 *Moody, C. C.* 160. Upon the same principle, the judges have held, that an indictment under the 7 & 8 Geo. 4, c. 29. § 25, for stealing a *sheep*, is not supported by proof of stealing an *ewe*, because the statute specifies both ewes and sheep. *Puddifoot's case*, 1 *Moody, C. C.* 247.

Where the prisoner was indicted for stealing "six handkerchiefs," and it appeared in evidence, that the handkerchiefs were all in one piece, not separated one from another, but that they were described in the trade as so many handkerchiefs, it was held to be no variance. *Nibb's case*, 1 *Moody, C. C.* 25. Where on an indictment for stealing a bank note, the note was described as being *signed by A. Hooper*, for the Governor and Company of the Bank of England, and no evidence was given of the signature of Hooper, the judges were of opinion

that the statement "signed by A. Hooper," required some evidence of the signature being by him. *Craven's case, Russ. & Ry.* 14.

Descriptive averments—the name of the prosecutor or party injured.] The name, both Christian and surname, of the person in whom the property is vested, which has been stolen, &c., or upon whom the offence is charged to have been committed, is matter of description, and must be proved as laid. But if the name of the prosecutor be that by which he is usually called and known, it is sufficient. The prisoner was tried for stealing the goods of Mary Johnson. The prosecutrix stated, that her original name was Mary Davis, but that she had been called and known by the name of Johnson for the last five years, and that she had not taken the name of Johnson for concealment or fraud; the judges were clearly of opinion that the time the prosecutrix had been known by the name of Johnson, warranted her being so called in the indictment, and that the conviction was right. *Norton's case, Russ. & Ry.* 510. So in a late case, where the prisoner was indicted for stealing the goods of *Richard* Pratt, and it appeared that his name was Richard *Jeremiah* Pratt, but he was equally well known by the name of *Richard* Pratt, it was ruled that the indictment was sustained. *Anon.* 6 *C. & P.* 408. Upon an indictment for the murder of a bastard child, described in the indictment as "George Lakeman Clark," it appeared it had been christened "George Lakeman," being the names of its reputed father; that it was called George Lakeman, and not by any other name known to the witnesses, and that the mother called it George Lakeman. There was no evidence that it had obtained, or was called by its mother's name of Clark. The judges held, that as this child had not obtained his mother's name by reputation, he was improperly called *Clark* in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. *Clark's case, Russ. & Ry.* 358. The prisoner was indicted for stealing the goods of *Victory, Baroness Turkheim.* The prosecutrix stated that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father, that she was constantly so called, and had constantly and uniformly acted in, and been known by that appellation, and that her name without her title was *Selina Victoire.* The Court said, that as the prosecutrix upon the present occasion had always acted in, and been known by the appellation *Baroness Turkheim,* and could not possibly be mistaken for any other person, it must be taken to be her name; and that, therefore, the indictment had named her with sufficient certainty. *Sull's case,* 2 *Leach,* 861.

Where an unmarried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described her by her maiden name, this was held to be sufficient. *Turner's case*, 1 *Leach*, 536.

Although where there are father and son of the same name, and that name is stated without any addition, it shall be *primâ facie* intended to signify the father, *Wilson v. Stubs*, *Hob.* 330, *Sweeting v. Fowler*, 1 *Stark.* 106, yet on an indictment containing the name without addition, it may be proved that either the father or son was the party intended. Thus on an indictment for an assault upon Elizabeth Edwards, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter, the defendant being convicted, the conviction was held good. *Peace's case*, 3 *B. & A.* 580.

An indictment is good, stating that the prisoner stole or received the goods of a person, *to the jurors unknown;* but in case the owner of the goods be really known, an indictment alleging the goods to be the property of a person unknown, would be improper, and the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. 2 *Hale*, *P. C.* 621. Where the property was laid in one count as belonging to certain persons named, and in another, as belonging to persons unknown, and the prosecutor failed to prove the christian names of the persons mentioned in the first count, it was held by Richards, C. B. that he could not resort to the second count, and the prisoner was acquitted. *Robinson's case*, *Holt*, *N. P. C.* 595. An indictment against the prisoner as accessory before the fact to a larceny, charged that *a certain person to the jurors unknown*, feloniously stole, &c. and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but Le Blanc J. interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *Walker's case*, 3 *Campb.* 264. But where an indictment stated that a certain person to the jurors unknown, burglariously entered the house of H. W., and stole a silver cream jug, &c. which the prisoner feloniously received, and it appeared that amongst the records of indictments returned by the same grand jury, there was one charging Henry Moreton, as principal in the burglary, and the prisoner as accessory in receiving the cream jug; that H. W.'s house had

been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M. being no objection to the other indictment. *Bush's case, Russ. & Ry.* 372.

It is not necessary that there should be any *addition* to the name of a prosecutor or prosecutrix in an indictment; all the law requires upon this subject is certainty to a common intent. *Per cur. Sull's case,* 2 *Leach,* 862. The prisoner was indicted (before the 39 & 40 G. 3. c. 77. the Act of Union) for stealing the goods of James Hamilton, Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland, and it appeared that he was an Irish peer. The judges were of opinion that "James Hamilton, Esq." was a sufficient description of the person and degree of the prosecutor, and that the subsequent words, "commonly called Earl of Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage. But they conceived that the more correct and perfect mode of describing the person of the prosecutor would have been. "James Hamilton, Esq., Earl of Clanbrassil," and as that more perfect description appeared upon the face of the indictment, by considering the intervening words, "commonly called," as surplusage, they thought that the indictment was good. *Graham's case,* 2 *Leach,* 547. So where the prisoner was indicted for stealing the goods of A. W. Gother, *Esq.*, and it was objected that Mr. Gother was not an esquire in law, Burrough J. overruled the objection, and held that the addition of esquire to the name of the person in whom the property is laid, is mere surplusage and immaterial. *Ogilvie's case,* 2 *C. & P.* 230. Where a person has a name of dignity, he ought to be described by that name, and as it forms part of the name itself, and is not an addition merely, it must be proved as laid. *Archb. C. L.* 11, 2 *Russ.* 708, (*n.*)

Descriptive averments—the name of the prosecutor or party injured—rule of idem sonans.] Where a name which it is material to state, is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. Thus where the name in the indictment was *John Whyneard,* and it appeared that the real name was *Winyard,* but that it was pronounced *Winnyard,* the variance was held to be immaterial. *Foster's case, Russ. & Ry.* 412. So *Segrave* for *Seagrave, Williams v. Ogle,* 2 *Str.* 889. *Benedetto* for *Benidítto, Abitbol v. Benidítto,* 2 *Taunt.* 401. But *M'Cann* for *M'Carn,* is a fatal variance. *Tannet's case, Russ. & Ry.* 351. So *Shakespeare* for *Shakepear, Shakespeare's case,* 10 *East,* 83. So *Tabart* for *Tarbart, Bingham v. Dickie,* 5 *Taunt.* 14.

Descriptive averments — the names of third persons mentioned in the indictment.] Not only must the names descriptive of the prosecutor or party sustaining the injury be strictly proved, but where the name of a third person is introduced into the indictment, as descriptive of some person or thing, that name also must be proved as laid. On an indictment upon the black act, for maliciously shooting A. Sandon, in the dwelling house of *James* Brewer and *John* Sandy, it appearing in evidence that it was in the dwelling house of *John* Brewer and *James* Sandy, the court said that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance. The statute says, "who shall maliciously shoot at any person, in any dwelling house or other place," and the prosecutor having averred that it was in the house of *James Brewer* and *John Sandy*, was bound to prove it as it was laid. *Durore's case*, 1 *Leach*, 352, 1 *East*, *P. C.* 45. So where the indictment was for breaking, &c. the house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an aquittal, and it was ruled that the words "of J. W." could not be rejected as surplusage, since they were sensible and material, it being material to lay truly the property in the goods, without such words the description of the offence being incomplete. *Jenks's case*, 2 *East*, *P. C.* 514. Again, where a person was indicted for feloniously marrying Elizabeth Chant, *widow*, (his former wife being alive,) and it appeared that Elizabeth Chant was a single woman, the judges were unanimously of opinion that the misdescription was fatal, though it was not necessary to have stated more than the name of the party. *Deeley's case*, 1 *Moody*, *C. C.* 303.

But where the name of a third person is stated in an averment, unnecessarily introduced, and which may therefore be rejected as surplusage, a variance will not be material. Upon an indictment for robbery, it is not material in what place the robbery was committed; and therefore, where the prisoner was indicted for robbing Robert Fernyhough, *in the dwelling-house of Aaron Wilday*; but the offence was not proved to have been committed in the house of Wilday, the judges held the conviction proper. *Pye's case*, 2 *East*, *P. C.* 785, 1 *Leach*, 352 (*n.*) And where the prisoner was convicted on an indictment for robbing R. D. in the dwelling-house of *Joseph* Johnstone, at Birmingham, and the Christian name of Johnstone could not be proved, the judges also held this conviction proper. *Johnstone's case*, 2 *East*, *P. C.* 786, 1 *Leach*, 352 (*n.*); *and see* 1 *East*, *P. C.* 415.

Descriptive averments—the mode of committing offences.] In general the descriptive averments of *the mode in which an offence has been committed* do not require to be strictly proved, if, in substance, the evidence supports the allegation. Thus, in murder, it is always sufficient, if the mode of death proved agree in substance with that charged. 1 *Russ.* 466. 1 *East, P. C.* 341. Therefore, though where the death is occasioned by a particular weapon, the name and description of that weapon must be specified; yet, if it appear that the party was killed by a different weapon, it maintains the indictment; as if a wound or bruise be alleged to be given with a sword, and it prove to be with an axe or staff, this difference is immaterial. And the same if the death be laid to be by one sort of poisoning, and in truth it be by another. 1 *East, P. C.* 341. Where the indictment was for assaulting a person with a certain offensive weapon, commonly called a *wooden staff*, with a felonious design to rob him, and it was proved to have been with a *stone;* on a conference of the judges it was held well, for the two weapons produce the same sort of mischief, viz. by blows and bruises; and they said it would be sufficient on an indictment for murder. *Sharwin's case*, 1 *East, P. C.* 341. Though the weapon need not be proved to be the same, yet it must appear that the species of killing was the same. Thus if the prisoner be indicted for poisoning, it will not be sufficient to prove a death by shooting, starving, or strangling. *Mackally's case*, 9 *Rep.* 67. 2 *Inst.* 319. 1 *Russell*, 467.

Where the prisoner was indicted for administering to one H. M. G. a single woman, divers large quantities of a certain shrub called savin, with intent to procure the miscarriage of the said H. M. G.; and it appeared that the prisoner had prepared the medicine by pouring boiling water over the leaves of a shrub, a process which the medical witnesses stated was an *infusion*, and not a *decoction*, Lawrence, J. over-ruled an objection taken on this ground. He said that infusion and decoction were *ejusdem generis*, and that the question was whether the prisoner administered any matter or thing with intent to procure abortion. *Anon.* 3 *Campb.* 74, *and see post*, "*Malicious injuries*," and "*Murder.*"

So also with regard to the person by whom the offence is committed, it is sufficient to charge him with that which is the legal effect of the act which he has committed. Therefore where an indictment charges that A. gave the mortal stroke, and that B. & C. were present aiding and abetting; if it appear in evidence that B. was the person who gave the stroke, and that A. & C. were present aiding and abetting, they may all be found guilty of murder or manslaughter, at common law, as circumstances may vary the case. The identity of the person supposed to have given the stroke is but a circumstance, and in this case a very immaterial one,—the stroke of one being in

consideration of law the stroke of all. The person giving the stroke is no more than the hand or instrument by which the others strike. *Foster*, 351, 1 *Hale, P. C.* 437. 463, 2 *Id.*, 344, 345.

Descriptive averments—what are not material.] The general rule with regard to immaterial averments has been thus stated. If an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. 1 *Phill. Ev.* 196. Therefore, where the name of a person or a place is unnecessarily introduced, it need not be proved. Thus where the prisoner was indicted for robbing another *in a field near* the highway, and the jury found that he was guilty of robbing, but not near the highway; the variance was held to be immaterial. *Wardle's case*, 2 *East, P. C.* 785. *Vide ante, p.* 82. And so where on an indictment for robbery, if the offence be laid to have been committed in the house of A. B. it is no variance if it be proved to have been committed in the house of C. D. *Pye's case*, 2 *East, P. C.* 785, *Johnstone's case, Id.* 786, *ante p.* 82. The prisoner was indicted and convicted under the 3 & 4 W. & M. c. 9. s. 5. for stealing goods "of John Powell, then being in a lodging-room in his dwelling-house, let by contract by Elizabeth his wife." The statute, in describing the offence, takes no notice of the person by whom the goods or lodging may have been let. The judges held the conviction right. They were inclined to think it was unnecessary to state by *whom* the lodging was let; and they were unanimously of opinion that the letting might be stated either according to the fact, or the legal operation. *Healey's case*, 1 *Moo. C. C.* 1. Where the prisoner was indicted on the 4 G. 2. for stealing lead "belonging to the Rev. C. G., clerk, and then and there fixed to a certain building called Hendon church;" the judges held that laying the property in the vicar was good. But many of them thought that the better way of laying the case would be to allege the lead to have been "fixed to a certain building, being the parish church," &c. without stating the property to be in any one. Buller, J. thought that charging it to be property, was absurd and repugnant; property (in this respect) being only applicable to personal things, and that it should be charged to be lead affixed to the church, or to a house belonging to such a person; and that the allegation as to property in this indictment should be rejected as surplusage. *Hickman's case*, 2 *East, P. C.* 593, 1 *Moody, C. C.* 2. (*n.*) *Vide post.*

Averments as to time.] Although an indictment, not alleging any time at which the offence was committed would be bad, *Hawk. P.C. b.* 2. *c.* 25. yet it never was necessary, upon

any indictment, to prove that the offence was committed upon the particular day charged. 1 *Phill. Ev.* 203. Thus even in treason, if the overt acts be laid on one certain day, evidence of them *after* that day is admissible. *Townley's case, Foster*, 8. So on an indictment for a misdemeanor, containing several counts, alleging several misdemeanors of the same kind on the same day, the prosecutor may give evidence of such misdemeanors on different days. *Levy's case*, 2 *Stark.* 458. And where a statute makes an offence committed after a given day triable in the county where the party is apprehended, and authorises laying it as if committed in that county, but does not vary the nature or character of the offence, it is no objection that the day laid in the indictment, is before the day mentioned in the statute, if the offence was in fact committed after that day. *Treharne's case*, 1 *Moody, C. C.* 298.

Averments as to place.] In general it is sufficient to prove that the offence was committed in the county in which it is laid to have been committed, and a mistake in the particular place in which an offence is laid, will not be material. *Hawk. P. C. b.* 2. *c.* 25. *s.* 84. 1 *Phill. Ev.* 205. 2 *Russ.* 716. And although the offence must be proved to have been committed in the county where the prisoner is tried, yet after such proof the acts of the prisoner in any other county, tending to establish the charge against him, are admissible in evidence, 1 *Phill.* 206. In an indictment for robbery the offence was laid in the parish of *St. Thomas, Penford*, in the county of Somerset, and it was objected for the prisoner that there was no proof of there being such a parish, but Littledale J. overruled the objection: he said that he once reserved a case from the Oxford circuit on this ground, and that a great majority of the judges held that it was not necessary to prove affirmatively for the prosecution, that such a parish as that laid in the indictment existed within the county, and that they expressed a doubt how they should hold, even where it was proved negatively for the prisoner, that there was no such parish, *Dowling's case, R. & M. N. P. C.* 433. So where a larceny was charged to have been committed in a dwelling house, situate in the parish of *St. Botolph, Aldgate*, and it appeared that the proper name of the parish was St. Botolph-without-Aldgate, the judge directed an acquittal on the capital part of the charge, but the prisoner was convicted of the larceny, and on a case reserved, the judges were of opinion that the conviction was right, there being no negative evidence of there not being such a parish as *St. Botolph, Aldgate. Bullock's case*, 1 *Moody, C. C.* 324. (*n.*) With regard to the latter point it was formerly laid down that where it was proved that no such place existed, the indictment was void by 9 Hen. 3. st. 1. c. 1. (made perpetual by 18 Hen. 6. c. 12.) and on the objection being taken in a case before Mr. Justice

Lawrence, he reserved the point for the opinion of the judges; but it was never decided. *Anon.* 3 *Campb.* 77. It was there contended against the objection, that to lay a place was no longer necessary, as the jury are to come from the body of the county; and though this was a mistake, (*see* 1 *Phill.* 206. *n.*) yet now by 6 G. 4. c. 50. s. 13. the return is from the body of the county. The point at length appears to have been settled in the following case. The prisoner was indicted for setting fire to a stack of beans at *Normanton-in-the-Would*. It appeared that there was no such parish, but only a hamlet of that name, nor was there any parish of Normanton. The judges, on a case reserved, held that the offence had nothing of locality in it, and that there was no such place in the county, could only be taken advantage of by plea in abatement. *Woodward's case*, 1 *Moody, C. C.* 323.

In some particular cases it is necessary to prove the parish or place named in the indictment. Thus, as in an indictment against a parish for not repairing a highway, the situation of the highway within the parish is a material averment, *see* 2 *Stark. C. P.* 693. (*n.*) it must be proved as laid. So if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Archb. C. P.* 63. 2 *Russ.* 717. Where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury. 3 *Stark. Ev.* 1571, *citing Cranage's case, Salk.* 385. 2 *Russ.* 717.

Averments as to value.] In general it is not necessary to prove the value of the property stolen or injured to be the same as that laid in the indictment, though formerly the distinction between grand and petty larceny depended upon the value of the property stolen; yet as that distinction is now abolished by the 7 & 8 Geo. 4. c. 28. the value has become immaterial, except in those cases where by statute the stealing property to a certain value enhances the punishment, as by the 7 & 8 Geo. 4. c. 29. s. 12. stealing in any dwelling house, any chattel, &c. to the value of five pounds. So the value is material in an indictment on the stat. 6 Geo. 4. c. 16. s. 112. against a bankrupt for removing, concealing, or embezzling any part of his estate to the value of 10*l.* or upwards. On an indictment against a bankrupt under the former statute, it was held that the value being essential to constitute an offence, and being ascribed to many articles collectively, the offence must be made out as to every one of those articles, for the grand jury has only ascribed that value to all the articles *collectively*. *Forsyth's case, Russ. & Ry.* 274.

WITNESSES.

ATTENDANCE, REMUNERATION, AND PROTECTION OF WITNESSES.

Mode of compelling the attendance of Witnesses . 87
By recognizance 87
By subpœna 89
By habeas corpus ad testificandum . . 89
Remuneration of witnesses . . . 91
Whether witness is bound to answer without tender of expenses 92
Protection of witnesses . . . 93

Mode of compelling their attendance—recognizance.] There are two modes of compelling the attendance of witnesses; first by recognizance, secondly by subpœna.

By the 7 Geo. 4. c. 64. s. 2. in cases of felony and suspicion of felony, the justice or justices before whom the offender is brought to be examined, shall have power to bind by recognizance all such persons as know or declare any thing material concerning such offence, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or of great session, or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused. By s. 3. the justice or justices have similar powers to bind by recognizance where the offender is charged with a misdemeanor, or suspicion thereof. If a witness, examined before a justice of the peace, refuses to be bound over, he may be committed. 2 *Hale, P. C.* 284. But where the witness cannot find sureties, the magistrate ought to take his own recognizance, and it would be illegal to commit the witness. *Per Graham B. Bodmin Summer Assizes*, 1827. 2 *Stark. Ev.* 82, 2*d ed.*

Where the witness was a married woman, and therefore incapable of entering into a recognizance, it was held that the magistrate was justified in committing her on her refusal to appear to give evidence, or to find sureties for her appearance to give evidence. *Bennett v. Watton*, 3 *M. & S.* 1.

Formerly, where a person had entered into a recognizance to prosecute or give evidence, and did not appear, such recog-

nizance was, as a matter of course, estreated ; but now, in such cases, by statute 7 Geo. 4. c. 64. s. 31. such recognizances are not to be estreated without the written order of the judge, &c. who shall have attended the court, who shall make an order touching the estreating or putting in process of such recognizance.

Where a witness has not been found by recognizance to appear, he may be compelled to do so by *subpœna*. This process is issued by the clerk of the peace at sessions, or by the clerk of assize at the assizes, or it may be issued out of the Crown Office. The latter is the most prudent course, as it affords the most facilities for obtaining an attachment in case of a refusal to attend, and may be served out of the jurisdiction of an inferior court. 1 *Chitty, C. L.* 608. 2 *Russ.* 638. *Ring's case*, 8 *T. R.* 585. By stat. 15 Geo. 3. c. 92. s. 3. the service of a subpœna in any part of the united kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to appear. *Vide post.*

Where there are writings or documents in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum*, directing the witness to bring with him into court the documents in question, is added to the writ of *subpœna*. If the documents are in the possession of the party or his attorney, a notice to produce must be given. Where documents are in the possession of the prosecutor, and the prisoner is desirous of having them produced upon the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpœna duces tecum*, and not to rely on a notice to produce, since it may be a question whether a prosecutor is so far a party to the proceeding as to be affected by a notice to produce. The *subpœna duces tecum* is compulsory on the witness, and though it is a question for the decision of the presiding judge, whether the witness in court should produce the documents required, yet he ought to be prepared to produce them, if the judge be of that opinion. *Anney v. Long*, 9 *East*, 473. It is no excuse for not producing a document, that it does not belong to the witness, provided it be in his possession. *Corsen v. Dubois, Holt, N. P. C.* 239.

The witness must be personally served by leaving with him a copy of the *subpœna*, or a *ticket* which contains the substance of the writ. 1 *Phill. Ev.* 3. 2 *Russ.* 639. 1 *Stark. Ev.* 77, 2*d ed. Maddeson v. Shore*, 5 *Mod.* 355. It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in London, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too short. 2 *Tidd*, 856, 8*th ed.*

In order to compel the appearance of a witness in one part of the united kingdom, upon process served in another part, it is enacted by stat. 45 Geo. 3. c. 92. s. 3 & 4, that the service of a

writ of *subpœna* in any one of the parts of the united kingdom, shall be as effectual to compel the appearance in any other of the parts of the united kingdom, as if the process had been served in that part where the person is required to appear. And if the person required to attend does not appear, the court out of which the process issued may transmit a certificate of the default, in the manner specified in the act; (*vide post*, p. 90.) and the court to which the certificate is transmitted may punish the person for his default, as if he had refused to appear to process issuing out of that court, provided it appear that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning, was tendered to the person making default, at the time when the *subpœna* was served upon him.

Mode of compelling the attendance of witnesses—subpœna for prisoner.] In cases of misdemeanor, the defendant at common law was entitled to a writ of *subpœna*, but it was otherwise in capital cases, in which the party was compelled to obtain a special order of the court. 4 *Black. Com.* 359. If the attendance of the witness was procured he was not allowed to be sworn. But by stat. 7 Will. 3. c. 3. s. 7., all persons indicted for high treason, whereby corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them. And by stat. 1 Ann. st. 1. c. 9., all witnesses on behalf of a prisoner, for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury. A witness who refuses, after having been subpœnaed to attend, to give evidence for a prisoner, is liable to an attachment in the same manner as if subpœnaed for the prosecution. 1 *Stark. Ev.* 85. 2*d ed.*

Mode of compelling the attendance of witnesses—habeas corpus ad testificandum.] Where a person required as a witness is in custody, or under the duress of some third person, so as to prevent his attendance, the mode of compelling it is to issue a *habeas corpus ad testificandum*. For this purpose application must be made to the court before which the prisoner is to be tried, or to a judge, upon an affidavit, stating that the party is a material witness, and willing to attend. *R. v. Roddam, Cowp.* 672. 1 *Phill. Ev.* 5. But it seems only necessary to state that the witness is ready to attend where he is not a prisoner. *Id.* 1 *Stark. Ev.* 80. 2*d ed.* The court will then, if they think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus*. *Burbage's case*, 3 *Burr.* 1440. 1 *Phill. Ev.* 8.

By stat. 43 Geo. 3. c. 140. a judge of the King's Bench or Common Pleas, or a baron of the Exchequer, may, at his dis-

cretion, award a writ of *habeas corpus ad testificandum*, for bringing any prisoner detained in any gaol in England before a court martial, or before commissioners of bankruptcy, commissioners for auditing the public accounts, or other commissioners, acting by virtue of any royal commission or warrant. By stat. 44 Geo. 3. c. 102. the judges of the King's Bench, or Common Pleas, or barons of the Exchequer in England or Ireland, or the justices of oyer and terminer, or gaol delivery, (being such judge or baron) have power to award writs of *habeas corpus*, for bringing prisoners, detained in gaol, before such courts, or any sitting at *nisi prius*, or before any court of record in the said parts of the said united kingdom, to be there examined as a witness, and to testify the truth before such courts, or before any grand, petit, or other jury, in any cause or matter, civil or criminal, which shall be depending, or to be inquired into, or determined, in any of the said courts. The application under this statute ought to be to a judge out of court. *Gordon's case*, 2 *M. & S.* 582.

The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable expenses. 1 *Phill. Ev.* 5. 1 *Stark. Ev.* 81. 2*d ed.* If the witness be a prisoner at war, he cannot be brought up, without an order from the Secretary of State. *Furly v. Newnham*, 2 *Doug.* 419.

Mode of compelling the attendance of witnesses—neglect to obey subpœna.] Where a person, who has been duly served with a *subpœna*, neglects to appear in obedience to it, he is punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence upon the trial of the prisoner, and may then be set at liberty. 1 *Chitty, Crim. Law*, 614. The party disobeying is subject to an attachment, although the cause was not called on. *Barrow v. Humphreys*, 3 *Barn. & Ald.* 598. *Tidd*, 858. 8*th Ed.* If the *subpœna* issued out of the crown office, the Court of King's Bench will, upon application, grant the attachment. *King's case*, 8 *T. R.* 585. When the process is not issued out of the crown office, and is served in one part of the United Kingdom for the appearance of the witness in another part, it is enacted by 45 G. 3. c. 92. s. 3, 4., that the court issuing such process may, upon proof to their satisfaction of the service of the subpœna, transmit a certificate of the default of the witness under the seal of the court, or under the hand of one of the justices thereof to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland, if in Ireland, which courts are empowered to punish the witness in the same way, as if he had disobeyed a subpœna issued out of these courts, provided the expenses have been tendered. *Vide ante, p.* 88.

The above enactment appears to extend only to cases where the process is served in one part of the United Kingdom for the appearance of the witness in another part of the same. Where, therefore, that is not the case, and the *subpœna* has not issued from the crown office, application must be made to the Court, out of which the process issued. It is doubtful whether the justices in sessions have the power of proceeding against a party by attachment, and in such case the mode of punishing would, it seems, be by indictment. *Arch. Cr. Law*, 108. 2*d. ed.* If a witness refuses to give evidence before a Court of Quarter Sessions, he may be fined and imprisoned, until the fine be paid. *Lord Preston's case*, 1 *Salk.* 279. A peer of the realm is bound to obey a *subpœna*, and is punishable in the same manner as any other subject for disobedience. *Lord Preston's case*, 1*Salk.* 278.

Remuneration of witnesses.] At common law there was no mode provided for reimbursing witnesses for their expenses in criminal cases; but by statutes 27 Geo. 2. c. 3.; 18 Geo. 3. c. 19. and 58 Geo. 3. c. 70. provision was made for this purpose in cases of felony. By the 7 Geo. 4. c. 64. the above statutes are repealed, and the expenses of witnesses in cases of misdemeanor as well as felony, are now allowed. By s. 22. of that statute it is enacted, that with regard to the expenses of prosecutions in cases of felony, the Court before which any person shall be prosecuted or tried for any felony, is thereby authorised and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna, to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor, of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money, as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred, in attending before the examining magistrate, or magistrates, and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person in the opinion of the Court, *bonâ fide*, have attended the Court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money, as to the Court shall seem reasonable and sufficient to reimburse such person for the expense which he or she shall *bonâ fide* have incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time, and the amount of expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and

loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attending in Court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the Court, subject nevertheless to the regulations to be established in the manner thereinafter mentioned.

And with regard to *misdemeanors*, it is enacted by sec. 23. of the same statute, that where any prosecutor or other person shall appear before any Court, on recognizance or subpœna, to prosecute, or give evidence against any person indicted for any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such Court is thereby authorised and empowered to order payment of the costs and expenses of the prosecution, and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as the Court are thereinbefore authorised and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have, *bonâ fide*, attended the Court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in cases of misdemeanor, the power of ordering the payment of expenses and compensation, shall not extend to the allowance before the examining magistrate. See further as to the expenses of witnesses, title "*Practice.*"

Remuneration—witness bound to answer without tender of expenses.] The only instance in which it appears to be necessary to tender expenses to a witness in a criminal case before his examination, is where a *subpœna* is served on a person in one part of the united kingdom for his appearance in another. In such case, the 45 Geo. 3. c. 92. (*ante*, *p.* 90,) enacts, that such subpœna shall be effectual, provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the *subpœna*, for defraying the expenses of coming, attending, and returning. It has, however, been doubted, whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a *subpœna*, and the doubt is founded upon

the provision of the above statute. 1 *Chitty, Crim. Law*, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions, are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the *subpœna*, although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. 1 *Phill. Ev.* 11. 2 *Russ.* 640. "It is," says Mr. Starkie, "the common practice in criminal cases, for the Court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid." 1 *Evid.* 83. *(a)* 2*nd ed.* And accordingly, at the York Summer Assizes, 1820, Bayley J. ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, "I fear, I have not the power to order you your expenses," and on asking the bar if any one recollected an instance in point, *Scarlett* answered, "it is not done in criminal cases." *Anon.* 1 *Chetw. Burn*, 1001. 2 *Russ.* 641. *(a)* So on the trial of an indictment which had been removed into the King's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the *subpœna* no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park J. having conferred with Garrow B. said, "We are of opinion that I have no authority in a criminal case, to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant; nor is the case altered by the indictment being removed by *certiorari*, and coming here as a civil cause." *R. v. James Stamp Sutton Cooke*, 1 *C. & P.* 321.

Protection of witnesses from arrest.] A witness attending to give evidence, whether subpœnaed, or only having consented to attend, *Smith v. Stewart*, 3 *East*, 89, is protected from arrest *eundo, morando, et redeundo. Meeking v. Smith*, 1 *H. Bl.* 636. A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal. 1 *Phill. Ev.* 4. 1 *Stark. Ev.* 90, 2*d ed.* A witness residing in London is not protected from arrest between the time of the service of the *subpœna*, and the day appointed for his examination; but a witness coming to town to be examined, is as it seems, protected during the whole time he remains in town, *boná fide*, for the purpose of giving his testimony. *Gibbs v. Philipson*, 1 *Russell & Mylne*, 19. If a witness is improperly arrested, the court out of which the subpœna issued, or a judge of the court in which the case has been, or is to be tried, will order him to be discharged. *Archb. Cr. Law*, 108, 2*d ed.*

INCOMPETENCY FROM WANT OF UNDERSTANDING.

Infants 94
Persons born deaf and dumb . . . 95
Idiots, Lunatics, and Madmen . . . 95

Infants.] It is said by Gilbert, C. B. that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence, but that the reason and sense of their evidence are to appear from the questions propounded to them, and their answers. *Gilb. Ev.* 144, *and see Dunnel's case*, 1 *East*, 422. In practice no particular age is required to render the evidence of a child admissible. In *Brazier's case*, 1 *East, P. C.* 443, 1 *Leach*, 199. *S. C.* Blackstone, Nares, Eyre, and Buller, JJ. were of opinion that the evidence of a child five years of age would have been admissible, if she had appeared on examination to be capable of distinguishing between good and evil. But others of the judges, particularly Gould and Willes, Js. held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence, or one of an inferior nature. If a child is, from want of understanding, incapable of giving evidence upon oath, proof of its declaration is inadmissible. *Tucker's case*, 1808, *MS.*, 1 *Phill. Ev.* 19, *Anon. Lord Raym. cited* 1 *Atk.* 29. It is said by Blackstone, that where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact, and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion. 4 *Com.* 214. It may, however, be observed, that the testimony of children, unless of a very tender age, is usually, from the quickness of apprehension possessed in early life, fully as well entitled to credit, as the evidence of persons of maturer years.

Where a case depends upon the testimony of an infant, it is usual for the court to examine him as to his competency to take an oath, previously to his going before the grand jury, and if found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. 1 *Stark. Ev.* 94, 2*d ed.*, 1 *Phill. Ev.* 19. This was done by Rooke, J. in the case of an indictment for a rape, and approved of by all the judges. 1 *Leach*, 430, (*n.*) 2 *Bac. Ab. by Gwill.* 577, (*n.*) The practice, however, is different with regard to an adult witness. *Wade's case*, 1 *Moo. C. C.* 86, *post.*

Deaf and dumb.] A person born deaf and dumb, though *primâ facie* in contemplation of law an idiot, yet if it appear that he has the use of his understanding, he is criminally answerable for his acts. 1 *Hale, P. C.* 37, *vide post*, and is also competent as a witness. Thus where a man deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness, "the questions and demands made by the court to the witness, and the answers made to them." The sister stated, that for a series of years, she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *Ruston's case*, 1 *Leach*, 408. So in Scotland, upon a trial for rape, the woman, who was deaf and dumb, but had been instructed by teachers, by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined. *Martin's case*, 1823, *Alison's Prac. Crim. Law of Scotl.* 486.

Idiots and Lunatics.] Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it, as to render it unsafe to trust to their testimony, are incompetent witnesses.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals, *Co. Litt.* 247. *Bac. Ab. Idiot*, (*A.* 1,) and cannot be received as a witness. *Com. Dig. Testm.* (*A.* 1.)

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness, *in lucidis intervallis. Com. Dig. Testm.* (*A.* 1.) He must of course have been in possession

of his intellect at the time of the event, to which he testifies, as well as at the time of examination, and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. *Alison's Prac. C. L. of Scotl.* 436. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject, (not touching the matter in question) and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy, the extent and influence of such a state of mind.

INCOMPETENCY FROM WANT OF RELIGIOUS PRINCIPLE.

General Rules 96
Form of the Oath 97
Questions as to religious belief . . . 98
Quakers and Moravians . . . 99
Persons excommunicated . . . 99

General rules.] Although it was formerly held that infidels, (that is to say, persons professing some other than the Christian faith,) could not be witnesses, on the ground that they were under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer; *Gilb. Ev.* 142.; yet a different rule has since prevailed, and it is now well settled, since the case of *Omichund v. Barker, Willes*, 549, that those infidels who believe in a God, and that he will punish them in this world, or (as it seems,) in the next, if they swear falsely, may be admitted as witnesses in this country. *Id. p.* 550.

It was said by Willes, C. J. that he was clearly of opinion that those infidels, (if any such there be,) who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. *Omichund v. Barker, Willes*, 549. A witness was rejected on this ground by Grose, J. at the Bedford Spring Assizes, 1789, on an indictment for murder. *Anon.*

1 *Leach*, 341. (*n.*) And where a witness on the *voire dire* stated that he had heard there was a God, and believed that persons who tell lies would come to the gallows; but acknowledged that he had never learned the catechism, that he was altogether ignorant of the obligation of an oath, a future state of reward and punishment, the existence of another world, and what became of wicked people after their death; he was rejected, on the ground that a person who has no idea of the sanction which this appeal to Heaven creates, ought not to be sworn as a witness. *White's case*, 1 *Leach*, 430. Upon this case it may be observed, that it seems to come within the rule with regard to competency, laid down by Willes, C. J. in *Omichund v. Baker*, *Willes*, 550, the witness believing that perjury would be punished by God in this world, and that upon this ground the testimony of the witness was admissible.

It is not yet settled by the Scotch law, whether a witness, professing his disbelief in a God, and in a future state of rewards and punishments, is admissible. "When the point shall arrive," says Mr. Alison, "it is well worthy of consideration, whether there is any rational ground for such an exception;"—"whether the risk of allowing unwilling witnesses to disqualify themselves, by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession." *Alison*, *Prac. Cr. L. Scot.* 438.

Form of the oath.] The form of oaths, under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain to compel a man to swear by a God in whom he does not believe, and whom he therefore does not reverence. *Puffend. b.* 4. *c.* 2. *s.* 4. A Jew consequently is sworn upon the Pentateuch. 2 *Hale*, *P. C.* 279. *Omichund v. Baker*, *Willes*, 543. But a Jew who stated that he professed Christianity, but had never been baptized, nor ever formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *Gilham's case*, 1 *Esp.* 285. A witness who stated that he believed both the Old and the New Testament to be the word of God, yet as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds v. Rowe*, *Ry. & Moo. N. P. C.* 77. So where a witness refused to be sworn in the usual form, by laying his right hand on the book, and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand; he was sworn accordingly. *Dalton v. Colt*, 2 *Sid.* 6. *Willes*, 553. And where on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hand to his buttons; and in reply to a question, whether

he was sworn, stated that he was sworn, and was under oath; it was held sufficient. *Love's case*, 5 *How. St. Tr.* 113. A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of the oath administered was, "You swear according to the custom of your country, and of the religion you profess, that the evidence," &c. &c. *Mildrone's case*, 1 *Leach*, 412. *Mee v. Reid*, *Peake, N. P. C.* 23. Lord George Gordon, before he turned Jew, was sworn in the same manner, upon exhibiting articles of peace in the King's Bench. *MS. M'Nally on Ev.* 97. In Ireland it is the practice to swear Roman Catholic witnesses upon a Testament with a crucifix or cross upon it. *Id.*

The following also is given as the form of a Scotch covenanter's oath: "I, A. B. do swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth; So help me God." 1 *Leach*, 412 (*n.*) *Walker's case*, *O. B.* 1788. *Ibid.* A Mahomedan is sworn on the Koran. The form in *Morgan's case*, 1 *Leach*, 54, was as follows. The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth.

The most correct and proper time for asking a witness whether the form in which the oath as about to be administered, is one which will be binding on his conscience, is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the party is not to be precluded; but the witness may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative, he cannot then be further asked, whether there be any other mode of swearing more binding upon his conscience. *The Queen's case*, 2 *Br. & B.* 284. So where a person who was of the Jewish persuasion, at the time of trial, and an attendant on the synagogue, was sworn on the Gospels as a Christian, the court refused a new trial on this ground; being of opinion that the oath as taken was binding on the witness, both as a religious and moral obligation; and Richardson, J. added, that if the witness had sworn falsely, he would be subject to the penalties of perjury. *Sells v. Hoare*, 3 *Br. & B.* 232, 7 *B. Moore*, 36. *S. C.*

Questions as to religious belief.] Although an opinion formerly prevailed, that if a person tendered as a witness professed

his disbelief in Christianity, *see* 1 *Atk.* 39. 50, he could not be received at a witness; yet it is now clearly settled, that upon an examination to try his competency with regard to religious principles, a question as to his belief in the Christian faith, is inadmissible. Thus where a witness was asked whether he believed in the Holy Gospels of God, on which he had been sworn, Buller, J. said, that this was not the proper question, and asked him whether he believed in God, and the obligation of an oath, and a *future* state of rewards and punishments; and on his answering in the affirmative, he was admitted. *Taylor's case, Peake, N. P. C.* 11. It seems that it would be sufficient to inquire whether he believed in a God who would punish falsehood either in this world or the next. *Willes,* 550 *ante, p.* 97.

Where it appeared that the prosecutrix, in an indictment for rape, though an adult, and of sufficient intellect, had no idea of a future state of rewards and punishments, Bayley, J. discharged the jury, that the witness might have an opportunity of being instructed upon that point before the next assizes; but referred the question to the twelve judges, who thought the discharge of the jury improper, and that the prisoner ought to have been acquitted. *Wade's case,* 1 *Moo. C. C.* 86.

Quakers and Moravians.] Quakers and Moravians, who refused to take an oath, were formerly inadmissible witnesses in criminal cases; 2 *Russ.* 592; but now by stat. 9 Geo. 4. c. 32. s. 1. every Quaker or Moravian who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration, in the words following: "I, A. B., do solemnly, sincerely, and truly declare, and affirm." Which said affirmation or declaration shall be of the same force and effect in all courts of justice and other places, where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such declaration or affirmation, shall be convicted of having wilfully falsely and corruptly affirmed, or declared, any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are, or shall be subject.

Persons excommunicated.] It was formerly held that persons excommunicated could not be witnesses; but now by stat. 53 G. 3. c. 127. s. 3. persons excommunicated shall incur no civil disabilities.

INCOMPETENCY FROM INFAMY.

What crimes disqualify - - - 100
In what manner the conviction must be proved - 101
Competency, how restored - - - 102
By suffering the punishment - - 102
By pardon - - - - 102
By reversal of judgment - - - 103

What crimes disqualify.] Where a man has been guilty of certain offences, the law has declared that his testimony shall not be received, on the ground of the infamy of character which the commission of such crimes indicates. It was formerly held, that where a man had undergone what was considered to be an infamous punishment, as the pillory, he was thereby rendered incompetent as a witness; but this rule has been long abandoned, and it is now determined that it is not the nature of the punishment, but of the offence which renders his evidence inadmissible. *Gilb. Ev.* 140. *B. N. P.* 291. *Priddle's case*, 1 *Leach*, 442.

The crimes that incapacitate the party committing them from giving evidence, are treason, felony, and every species of the *crimen falsi*, as perjury, forgery, and the like. *Gilb. Ev.* 139. *B. N. P.* 291. Barratry, *Ford's case*, 2 *Salk.* 690, *sed vide Com. Dig. Testm. A.* 4. *contra*, 1 *Leach*, 442. and bribing a witness, to absent himself from a trial, *Clancy's case, Fost.* 208, have been held to disqualify a witness. A conviction for a conspiracy does not appear, in all instances, to have that effect. In *Priddle's case*, 1 *Leach*, 442, where a person who had been convicted of a conspiracy, was produced as a witness, Buller J. rejected him, saying, "conspiracy is a crime of blacker dye than barratry, and the testimony of a person convicted of barratry has been rejected." The nature of the conspiracy is not stated. A man convicted of a conspiracy at the suit of the king, that is, of a conspiracy to accuse another of a capital offence, is incompetent, for there the offender is to have the villanous judgment, and to lose the freedom of the law. 2 *Hale, P. C.* 277. Where the reception of an affidavit was opposed on the ground that the party (Lord Cochrane) making it, had been convicted of a conspiracy to raise the public funds by false rumours, Sir William Scott, after much consideration, decided against the objection. *Case of the Ville de*

Varsovie, 2 *Dodgson*, 174, *see* 3 *Stark. N. P. C.* 22. So where a witness, who had been convicted of the same conspiracy, was produced, Abbott C. J. said, "In a doubtful case, the ordinary practice is to receive the evidence, and it appears to me that the present case is so far doubtful, that I am bound to receive the testimony of the witness, but I shall reserve the point." *Crowther v. Hopwood*, 3 *Stark.* 21, 1 *Dow. & Ry. N. P. C.* 5. *S. C.* But where the party is convicted of a conspiracy to do an act tending to pervert the course of justice, as in the case of a conspiracy to bribe a person summoned to give evidence before justices, on a revenue case, the conviction will render him incompetent. *Bushell v. Barrett*, *Ry. & Moo. N. P. C.* 434. It seems that a conviction for winning by fraud or ill practice in certain games, will render the party incompetent, since the statute of 9 Anne c. 14. s. 5. not only inflicts a penalty, but also enacts that he shall be deemed infamous, and one of the legal consequences of infamy is incompetency to give evidence. 1 *Phill. Ev.* 28. But a conviction for keeping a public gaming house was held by Abbott C. J. not to disqualify. *Grant's case*, *Ry. & Moo. N. P. C.* 270. Outlawry in a personal action does not disqualify, but it is otherwise with regard to outlawry for treason or felony. *Com. Dig. Testm. A.* 4. *Cetier's case*, *T. Raym.* 369. *Hawkins*, *P. C. b.* 2. *c.* 48. *s.* 22.

A person incompetent to give oral evidence in court, on the ground of infamy, will not be allowed to have his affidavit read. *Walker v. Kearney*, 2 *Str.* 1148. Unless it be to defend himself against a complaint. *Id. Davis and Carter's case*, 2 *Salk.* 461. A person who had been convicted of a conspiracy, (it is not stated of what nature) was held to be entitled to make an affidavit to hold to bail. *Park v. Strockley*, 4 *D. & R.* 144.

In what manner the conviction must be proved.] Where it is said that a witness is disqualified by *conviction*, a judgment of a court of competent jurisdiction is meant, and that judgment must be proved in the ordinary way. Parol evidence cannot therefore be given of it, and though the witness himself may admit that he was convicted of felony, this will not render him incompetent. *R. v. Castell Careinion*, 8 *East*, 78. So where a witness admits himself to have been guilty of perjury; this goes to his credibility merely, and not to his competency; *Teal's case*, 11 *East*, 309, and he is not inadmissible, though he admits that he perjured himself upon the point in question. *Id. Rands v. Thomas*, 5 *M. & S.* 246. It is not sufficient to give in evidence the indictment, and a verdict of guilty thereupon, without proving the judgment, for judgment may have been arrested. *Com. Dig. Testm.* (*A.* 4.) *Gilb. Ev.* 142. The record of the judgment therefore must be produced in

court; *Hawk. P. C. b.* 2. *c.* 46. *s.* 104, or an examined copy of it, as in other cases. 2 *Hale, P. C.* 278. It must appear that the party was convicted before a competent tribunal. Thus where, in order to prove a conviction at Sierra Leone, an indictment and conviction thereupon were given in evidence, Bayley J. held it insufficient, because it did not show by what authority the indictment was found; and because it was imperfect as a record without the caption. *Cooke v. Maxwell,* 2 *Stark.* 183.

Competency, how restored—by suffering the punishment.] Where the party convicted has suffered the punishment awarded, he is again rendered competent. The provisions on this subject, which were formerly contained in various statutes, are now consolidated in the 9 Geo. 4. c. 32, by the third section of which statute it is enacted, that where any offender has been or shall be convicted of any felony, not punishable with death, and has endured, or shall endure the punishment to which such offender has been, or shall be adjudged, for the same, the punishment so endured has and shall have the like effects and consequences, as a pardon under the great seal, as to the felony, whereof the offender was so convicted; provided always that nothing therein contained, nor the enduring of such punishment shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other felony.

The next section (4) provides for the cases of convictions for misdemeanors, and enacts that wherever any offender has been, or shall be convicted of such misdemeanor (certain misdemeanors which render the party convicted thereof incompetent) except perjury or subornation of perjury, and has endured or shall endure the punishment to which such offender has been or shall be adjudged for the same; such offender shall not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any court or proceeding, civil or criminal.

Where a person, sentenced to transportation for seven years, was confined in the Hulks during that period, but made his escape, twice, for a few hours each time, (for which he was punished), the judges held that these escapes, on which he was immediately brought back and served out the remainder of his term, did not prevent him regaining his competency. *Badcock's case, Russ. & Ry.* 248.

Competency, how restored—by pardon.] The competency of a person, whose evidence has been rendered inadmissible by conviction, is restored by the king's pardon, which has the effect of discharging all the consequences of the judgment. *Crosby's case,* 2 *Salk.* 689. But where the disability is not

merely a *consequence* of the judgment, but is a *part* of the judgment, as in case of judgment for perjury upon the stat. 5 Eliz., which provides that the party convicted shall never be admitted to give evidence till the judgment is reversed, the king cannot by his pardon restore competency, though it may be restored by act of parliament. *Id. Ford's case, Id.* 691. *Gilb. Ev.* 141. A man convicted of perjury *at common law*, is restored to his competency by pardon. *Id. Dover v. Maestaer*, 5 *Esp.* 94. *See Mr. Hargrave's learned Dissertation "On the effect of the King's pardon of Perjury."* 2 *Jurid. Argum.* 221.

At common law, it was necessary to produce the pardon under the great seal, and it was not sufficient to show it under the sign manual, or privy seal, which are only in the nature of warrants, and countermandable. *Gully's case*, 1 *Leach*, 98. *Miller's case*, 2 *W. Bl.* 797. *Earl of Warwick's case*, 5 *St. Tr.* 171. *fo. ed.* But now, by stat. 7 & 8 Geo. 4. c. 28. § 13. it is enacted, that where the king's majesty shall be pleased to extend the royal mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of the principal secretaries of state, shall grant to such offender, either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted. It will be observed that this statute does not apply to the case of convictions for misdemeanors. And, therefore, to restore the competency of persons so convicted, the pardon must still be shown under the great seal.

The king may extend his mercy on whatever terms he pleases and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, and on the performance of that condition, the validity of the pardon will depend. *Hawk. P. C. b.* 2. *c.* 37. § 28. It must, therefore, be proved, that the condition has been performed.

It has been held in Scotland, and it would probably be so held, if the point should arise in our own courts, that a person who has been convicted by a foreign tribunal of an offence incurring infamy, and pardoned by the sovereign authority in that country, is admissible as a witness here, if the law of the foreign country allows the competency of the party to be restored in that manner. *Smith's case*, 1788, *Burnet*, 405, *Alison, Prac.* 451.

Competency how restored — by reversal of judgment.] If a conviction and judgment are read on the one side to show the witness incompetent, they may be answered on the other, by reading a reversal of the judgment upon writ of error. If the incapacity arises from an outlawry, under a charge of treason

or felony, it will be removed by proof of the reversal of that outlawry. If the objection is, that the witness has been attainted by an act of parliament, which subjects him to all the penalties of an attainder, unless he surrenders before a certain day, (which is a kind of parliamentary outlawry,) it may be shewn that the witness surrendered conformably with the act. 1 *Phill. Ev.* 30.

INCOMPETENCY FROM INTEREST.

Nature of the interest in general . . 104
Rewards 104
Wager 105
Prosecutor, when competent . . . 105
Informers, when competent . . . 108
Inhabitants, when competent . . . 110
Bail incompetent 111
Interest, how removed . . . 112

Incompetency from interest—Nature of the interest in general.] Where a person interested in the event of the proceeding, is called as a witness, he may be rejected on the ground of a supposed want of integrity. But the interest must be such as the law recognizes, and the bias, arising from the witness standing in the same situation as the party by whom he is tendered, is not sufficient. 1 *Phill. Ev.* 45. Nor is a man incompetent, because he is personally interested in a similar question to that upon which he is called to give evidence. Thus, a person is not incompetent because he is possibly liable to be punished by an information, in the nature of a *quo warranto* for a past act, the lawfulness of which he may support by his testimony in another action to which he is not a party. *Gray's case, B. R. H.* 10 *Geo.* 2, 2 *Selw. N. P.* 1087. 4*th ed.*

Nature of the interest—Rewards.] The expectation of a benefit, not necessarily and legally flowing from the event of the proceeding, does not render a witness incompetent, as the promise of a pardon, *post, p.* 119. So where a woman gives evidence against a prisoner, under the hope that his conviction will tend to procure the pardon of her husband, who has been convicted, it goes to her credit only, and not to her competency. *Rudd's case,* 1 *Leach,* 127. So in prosecutions where there are rewards, although the reward can

only be the effect of the conviction, the prosecutors are competent witnesses, yet every man who comes as a witness, under the idea of having a reward on the conviction of the prisoner, may be said to be interested in point of property in the event of the cause, *Per Cur. Ibid.* After the riots of 1780, a reward was offered by government for the apprehension and conviction of any of the rioters, and a question arose, whether persons thus interested in the conviction of the criminals, were admissible witnesses against them. The twelve judges unanimously agreed that the testimony of the witnesses, who claimed and received the reward, was admissible. 1 *Leach*, 314. (*n.*) It is upon the principle, that the exclusion of persons entitled to rewards, would be inconsistent with the spirit of the acts giving the rewards, and against the grounds of public policy, that their competence is virtually continued. *Per Cur. Williams' case*, 9 *B. & C.* 556. With regard to rewards offered by private individuals, the principle upon which persons entitled to them have been held competent witnesses, is said to be, that the public have an interest upon public grounds, in the testimony of any person who knows any thing as to a crime, and that nothing private individuals can do will take away the right which the public have. *Ibid.*

Again, where a statute entitles a party to pardon, provided another offender be convicted on his testimony, (as was formerly the case upon the statutes 10 & 11 W. 3. c. 23. § 5., and 5 Ann. c. 31. § 4.) the party so entitled is a competent witness. Where the legislature has held out *that* as a reward by way of inducement for criminals to convict and make a discovery, it would be acting against the rules and principles of law if they were by giving their testimony, considered as interested in the event of the prosecution. *Per Cur. Rudd's case*, 1 *Leach*, 134, 135.

Nature of the interest—Wager.] If the witness lay a wager that he will convict the prisoner, he is still competent, though it goes to his credit. *Fox's case*, 1 *Str.* 652.

Prosecutor, when competent.] As a general rule, the prosecutor or party injured, is a competent witness in criminal prosecutions. This rule, which by some has been supposed to be grounded upon the absence of all legal interest, and by others, upon the principle that the law will not presume, that in a public proceeding a man will be actuated by revengeful or improper motives, appears to be grounded on reasons of public policy, which forbid the exclusion of the person whose evidence must usually be the most material in the case.

Though as a general rule a prosecutor is competent to prove the case for the prosecution, yet many instances occur, in which he may be interested in the event of the proceeding, and in

those cases his testimony cannot be received. But although he may have an interest in the event, he may yet be competent on the ground, that the statute which confers the interest, expressly or impliedly, recognizes his competency. *Vide post, Informers.*

Upon prosecutions for robbery, the party robbed has always been considered as a competent witness, although the stat. 21 H. 8. c. 11. gave him a writ of restitution for the recovery of the stolen goods upon the conviction of the offender. The reason of this, however, depends upon the words of the statute itself, which provide, that if the felon who robs be attainted by reason *of evidence given by the party robbed*, or owner of the money, &c. or by any other person by their procurement, the party robbed shall be restored to his money, &c. *Williams' case*, 9 *B. & C.* 550, 557.

On an indictment at common law for perjury, the prosecutor is a good witness. *R. v. Broughton*, 2 *Str.* 1229. *overruling Ellis's case*, *Id.* 1104., and *Whiting's case*, 1 *Salk.* 283. *See* 4 *Burr.* 2255. *B. N. P.* 289. But a distinction is taken between this case and that of an indictment for perjury upon the stat. 5 Eliz. c. 9. which gives the party grieved 10*l.*, (half the penalty) in which case it is said he will not be a competent witness. *B. N. P.* 289. *Hawk. P. C. b.* 2. *c.* 46. § 118. *Gilb. Ev.* 124. 2 *Stark. Ev.* 139. 2*d ed.* It has, however, been justly observed, that as in an action to recover this moiety, the party grieved would be precluded from giving the conviction in evidence, there appears to be no objection to his competency. 2 *Russell*, 546. It must be observed also, that the statute gives the moiety to such person that shall be grieved, &c., and *will sue for the same. See* 9 *B. & C.* 558. Although the suit, for perjury in the course of which the defendant is indicted, be not at an end, the prosecutor is still a competent witness. *Boston's case*, 4 *East*, 572.

It was formerly held, that the party whose signature was forged, was not a competent witness for the prosecution on an indictment for the forgery; 2 *Russ.* 601; but now, by stat. 9 Geo. 4. c. 32. § 2., it is enacted, "That on any prosecution by indictment or information, either at common law, or by virtue of any statute, against any person, for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged, or for being accessory before or after the fact to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have or be supposed to have, in respect of such deed, writing, instrument, or other matter."

Some of the older cases on the subject of the competency of

witnesses in criminal proceedings, were decided upon the idea that the conviction might be afterwards evidence for the witness in another proceeding; but it is now settled that the record of a conviction will not be received as evidence, either at law or in equity, in favour of the party upon whose testimony the conviction was procured. *Pickersgill's case*, 4 *East*, 577. (*n.*) *Boston's case*, 4 *East*, 582. So where a conviction before a magistrate proceeded on the evidence of A. B., although his name did not appear in the conviction, Lord Ellenborough refused to permit the conviction to be given in evidence for him, in an action for false imprisonment. *Smith v. Rummens*, 1 *Campb.* 9. And a conviction for a conspiracy proceeding on the evidence of *A.* is not evidence for him in an action for the same cause. *Hathaway v. Barrow*, 1 *Campb.* 151. So upon an indictment for usury, the prosecutor, the borrower of the money, is competent. *Sewel's case*, 7 *Mod.* 118. *Smith v. Prager*, 7 *T. R.* 60.

Upon an indictment for not repairing a highway, the prosecutor has been admitted as a witness, for though the Court is authorized (13 Geo. 3. c. 78. § 64.) to award costs against him, in case the proceedings shall appear to be vexatious, yet it would scarcely presume, in the first instance, that his conduct had been vexatious, so as to raise an objection to his competency, especially after the finding of a bill by the grand jury. *R. v. Inhab. Hammersmith*, 1 *Stark.* 357. *and note, Id.* 358. 1 *Russ.* 334.

So upon a removal of an indictment by *certiorari*, from the sessions to the Court of King's Bench, in which case the defendant, if convicted, is by stat. 5 & 6 Wm. & M. c. 11. liable to pay costs to the prosecutor, the latter is still a competent witness upon a principle of public policy, because, if the act of parliament which was designed to discourage removal of suits by *certiorari*, should take off the evidence of the prosecutor, it would give the greatest encouragement to them that is possible. *Muscot's case*, 10 *Mod.* 194. 2 *Russ.* 603.

Upon an indictment for a forcible entry under the stat. 21 Jac. 1. c. 16. or 8 H. 6. c. 9. by which the justices are empowered to make restitution of the premises entered upon, the prosecutor, the tenant of the premises so entered upon, is not a competent witness, on the ground of his interest in the restitution. "The public interest," said Mr. Justice Bayley, delivering the opinion of the court, "will still have the protection of a common law indictment, and there is nothing from which an inference can fairly be drawn, that it was with a view to the public interest, and not for the private benefit of the party grieved, that the provision for restitution was introduced into the statute. Where it is plain that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent."

Williams's case, 9 *B. & C.* 549. *Beavan's case*, *Ry. & Moo. N. P. C.* 242.

Informers, when competent.] Whether an informer, entitled by statute to the penalty or part of the penalty, upon the conviction of an offender, is a competent witness on the prosecution of such person, depends upon the terms of the statute creating the penalty. It has been already stated, (*ante*, *p.* 104,) that the mere fact of a reward being given to the party discovering an offender, will not incapacitate the party, if the statute giving the reward contemplates such person being a witness. And it seems to be now settled, that where a statute gives a reward, or the whole or part of a penalty to the informer, and such reward or penalty is not recoverable upon the indictment itself, but a distinct suit is necessary, then, as the conviction will not be evidence in such suit, the testimony of the party entitled to the penalty, &c. is admissible. See *Williams's case*, 9 *B. & C.* 557. Thus upon a prosecution upon the stat. 9 Ann. c. 14. s. 5. for penalties by the loser of money at cards, he is a competent witness, the penalties being given to such person or persons as shall sue for the same by action. *Luckup's case*, *cited Willes*, 425, (*a.*) 9 *B. & C.* 557. So on a prosecution for the penalty of 500*l.* under stat. 23 Geo. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, although the informer was entitled to a moiety of the penalty, upon suing for the same. *Johnson's case*, *Willes*, 425, (*a.*) 9 *B. & C.* 551.

Where the act giving the penalty to the informer or other person, contemplates his being a witness, he is of course admissible. Such persons are, in the words of Lord Ellenborough, "made witnesses by a legislative declaration." 4 *East*, 183. By stat. 2 G. 2. c. 24. s. 8. any offender within the act discovering within a certain time any other offender, so that the person discovered be thereupon convicted, the discoverer not having been himself before that time convicted, shall be indemnified and discharged from all penalties and liabilities incurred under the act. This gives a parliamentary capacitation to the witness, through whom the fact was discovered, and who might otherwise at common law have been incapacitated. *Heward v. Shipley*, 4 *East*, 180. *Bush v. Ralling*, *Phillips v. Fowler*, *cited Sayer*, 291, 9 *B. & C.* 557. So where upon an indictment on the 21 G. 3. c. 37. s. 1. for exporting machines used in the manufactures of this country, the informer, to whom the penalty (by s. 7.) is to go, when not otherwise provided for, was held by Lord Kenyon to be a competent witness, his lordship observing that the objection had been long since overruled in a case in Sir J. Burrows's Reports, soon after Lord Mansfield's coming into the court, in cases of bribery. (*Ralling's case*, *Sayer*, 289,) *Teasdale's case*, 3 *Esp.* 68. It is said by Mr.

Justice Bayley, delivering the judgment of the court, *in Williams's case*, 9 *B. & C.* 559, that Lord Kenyon seems to have considered the the term "informer," in the 21 Geo. 3. as equivalent to the term "person discovering," in 2 G. 2. c. 24. and as it had been held that the legislature must have decided that the person designated as "the person discovering" in the one case should be a witness, it must be taken to have had the same intention as to the person designated by the word "informer" in the other.

But where the penalty is recoverable on the indictment itself, and the informer is not driven to a suit, and is not rendered competent by the construction of the statute, his title to the penalty gives such an interest in the event of the prosecution as will incapacitate him. Thus a conviction for deer-stealing was quashed, because the same person was both informer and witness, and entitled to a part of the penalty. *Tilly's case*, 1 *Str.* 316. *Piercy's case, Andr.* 18. *Blaney's case, Id.* 240. *S. P.* So upon an information on the stat. 17 Geo. 2. c. 46. for having naval stores in possession, the informer, who was entitled to a moiety of the penalty given by the act, was rejected as incompetent by Lord Kenyon. *Blackman's case*, 1 *Esp.* 96. *sed vide post.* But where the statute gives the court power either to fine or imprison, a person who would be entitled to a portion of the fine is a competent witness. Thus upon an indictment on the above mentioned statute, 17 Geo. 2. which occurred soon after the decision of *Blackman's case*, (*supra*,) Lord Kenyon said, that since that decision, he had considered the objection to the informer being a witness on the ground of interest; that the statute having given a discretionary power to the court to inflict a corporal punishment, or to impose a fine, it was only in case a fine was imposed that the witness could expect to derive any benefit, and that was uncertain, as depending upon the judgment of the court, but he was now of opinion that the objection went to the credit, and not to the competency of the witness. *Cole's case*, 1 *Esp.* 169, *Peake*, 217.

In many cases informers entitled to receive penalties, are, notwithstanding, made competent witnesses by the express provisions of various statutes. Thus by stat. 6 Geo. 4. c. 108. s. 105. it is enacted that if upon any trial a question shall arise, whether any person is an officer of the army, navy, or marines, being duly authorized and on full pay, or officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information, on account of any seizure or penalty as aforesaid, notwithstanding such

officer or other person, may be entitled to the whole or any part of such seizure or penalty.

So in the statute 32 Geo. 3. c. 66. for preventing counterfeit certificates of servants' characters, and in 33 Geo 3. c. 75. s. 17. for regulating hackney coaches, similar provisions rendering the informer competent are contained. So also by stat. 27 Geo. 3. c. 29. the inhabitants of every parish, township, or place, shall be deemed and taken to be competent witnesses for the purpose of proving the commission of any offence within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, is or may be given, or applicable to the poor of such parish, township, or place, or otherwise, for the benefit or use, or in aid or exoneration of such parish, township, or place. Provided always, that nothing in this act contained, shall extend to any action or proceeding, in which the penalty or penalties to be recovered, shall exceed the sum of twenty pounds.

Inhabitants, when competent.] The rule with regard to the competency of inhabitants, is thus laid down by Chief Baron Gilbert. "The men of one county, city, hundred, town, corporation, or parish, are evidence in relation to the rights, privileges, immunities, and affairs, of such town, &c. if they are not concerned in private interest, in relation thereto, nor advantaged by such rights and privileges, as they assert by their attestation. Men of a county are evidence on an indictment for not repairing a bridge, whether it be in repair or not, for they are perfectly indifferent, because it is equal to every man that the bridge, for convenience of passage, should be repaired where it is necessary, as that they should not be put to unnecessary charge; for every man, for the convenience of his own passage, is concerned to uphold the bridge, and cannot be thought to create a useless charge, so that he is perfectly indifferent, being equally interested; but the men of a county cannot be sworn in a cause relating to the bounds of the county, in a suit depending between that and another county, carried on at the county charge, because every man is in such a case concerned to prevail in point of interest." *Gilb. Ev.* 126. Some doubt, however, existing with regard to the admissibility of the evidence of inhabitants, the stat. 1 Ann. St. 1. c. 18. s. 13. reciting, that such witnesses had been rejected, enacts that in all informations and indictments to be brought and tried in any of his Majesty's courts of record at Westminster, or at the assizes, or quarter sessions of the peace, the evidence of the inhabitants, being credible witnesses, or any of them, of the town, corporation, county, riding, or division, in which such decayed bridge or highway lies, shall be taken and admitted in all such cases in the courts aforesaid, any custom, rule, order, or usage to the contrary, notwithstanding.

The inhabitants of the hundred could not, before the stat. 8 G. 2. c. 16. s. 15. have been competent witnesses for the defence in an action on the statute of Winton, *Gilb. Ev.* 127, but by the statute of Geo. 2. they are rendered competent.

By the 13 Geo. 3. c. 78. s. 76. any inhabitant of any parish, township, or place, in which any offence shall be committed, contrary to that act, shall be deemed a competent witness, notwithstanding his or her being such inhabitant. And by sect. 68. the surveyor of any parish, township, or place, shall be deemed in all cases a competent witness in all matters relative to the execution of the act, notwithstanding his salary may arise in part from the forfeitures and penalties thereby inflicted.

The inhabitants of a *parish* are not, however, competent witnesses for the defence, in an indictment for not repairing a highway. *Dict. per Lord Ellenborough*, 1 *B. & A.* 66. 1 *Phill. Ev.* 119. 1 *Russ.* 334. 2 *Russ.* 602. Upon an indictment against the inhabitants of a *township*, for not repairing a highway, the defendants pleaded that one R. was bound *ratione tenuræ*, to repair. To prove this, an inhabitant of the township was called, who was not an occupier of land there, and consequently not rated to the poor; but Lord Kenyon rejected him as being directly interested in the event of the suit, because if there should be a verdict against the defendants, the witness, as an inhabitant, would be liable to the payment of the fine; and also any inhabitant is liable to the statute duty. *R. v. Inhab. Wheaton-Aston, Sergt. Williams' MSS.* 1 *Chet. Burn*, 980. 1 *Stark. Ev.* 144. 2*d ed.* But where a penalty is given to the poor of a parish, as the recovery of the penalties only goes to relieve such persons as are actually rated to the relief of the poor, an inhabitant of the parish, though omitted from the rate, for the very purpose of giving evidence, is a competent witness. *R. v. Inhab. Kirdford*, 2 *East*, 559. So a parishioner paying rates was held to be a competent witness in an action defended by an order of vestry, directing the costs to be defrayed out of the rates, such order being illegal. *Yates v. Lance*, 6 *Esp.* 132.

Bail incompetent.] In criminal as well as in civil cases, persons who have become bail are incompetent witnesses for the defence. Thus on the trial of John Hampden for a misdemeanor, Sir Henry Hobart was called as a witness for the defendant, and objected to on the ground of his being bail, and the objection was allowed; for the bail is exonerated from his recognizance on the discharge of his principal, but it was said that the bail might be changed, in order to make him a good witness. *Hampden's case*, 3 *St. Tr.* 842. *fo. ed.* 1 *M'Nally, Ev.* 59.

Interest, how removed.] Where the incompetency of a witness depends upon a pecuniary or other interest, with which he is capable of departing, it may be removed by a release or other proper mode. Thus before the passing of the 9 G. 4. c. 32. (which rendered the prosecutor in cases of forgery a competent witness, *vide ante*, 106.) a release from the holder of a promissory note, to the supposed drawer, in whose name it was forged, rendered the latter a competent witness to prove the forgery. *Akehurst's case*, 1 *Leach*, 150. So if the supposed obligor of a bond had been released by the supposed obligee. *Dodd's case*, 2 *East, P. C.* 1003, 1 *Leach*, 155.

It may also be shown that the witness, though once interested, has become competent by payment, or other matter, discharging the interest. Thus where the party, whose name was forged to a receipt, had recovered the money from the prisoner, he was held to be competent. *Wells' case*, *B. N. P.* 289. 12 *Vin. Ab.* 23. 1 *Stark. Ev.* 127. 2*d ed.*

If the party wishing to call an interested witness, tenders a release to him, which the witness refuses, he may still be examined. 1 *Phill. Ev.* 128. 2 *Russell*, 378. So if the witness himself tenders a release. *Bent v. Baker*, 3 *T. R.* 35. *Goodtitle v. Welford*, *Dougl.* 139.

The 26th section of the act for the further amendment of the law 2 & 3 W. 4. c. 42. relates only to the competency of persons called as witnesses on the trial of *actions*.

INCOMPETENCY—HUSBAND AND WIFE.

General rules 112
Lawful husband and wife only, excluded . . 113
Nature of the evidence which the husband or wife is excluded from giving . . . 113
Cases where the husband or wife has been held incompetent 114
Cases of personal violence . . . 115

General rules.] Husband and wife are in general incompetent witnesses, either for or against each other, on the ground partly of policy, and partly of identity of interest. The circumstance of one of the parties being called *for* or *against* the other, makes no distinction in the law. When admissible *against*, the testimony is likewise admissible *in favour*, of the other. *Serjeant's case*, *Ry. & Moo. N. P. C.* 352.

The declarations of husband and wife are subject to the same rule of exclusion as their *vivâ voce* testimony. *See* 1 *Phill. Ev.* 96.

In a civil case, Lord Hardwicke refused to permit the plaintiff's wife to be examined. though with the consent of the defendant; *Barker v. Dixie, Cases temp. Hard.* 264; but in a late case, (where the above decision was not cited,) the judge said he would permit the wife to be examined with the consent of the other party. *Pedley v. Wellesley*, 3 *C. & P.* 558.

Where the relation of husband and wife has once subsisted, the one is inadmissible for or against the other, even after the relation has ceased, with respect to matters which occurred during the continuance of the relation. Thus where a woman, divorced by act of parliament, and married again, was called to prove a contract by her former husband, she was rejected by Lord Alvanley. If she might be a witness, his Lordship observed, in a civil proceeding, she might equally be so in a criminal proceeding; and it never could be endured, that the confidence which the law had created, whilst the parties remained in the most intimate of all relations, should be broken, whenever by the misconduct of one party the relation has been dissolved. *Monroe v. Twisleton, Peake, Ev. App.* xci. *5th ed.* Upon the authority of this case, Best. C. J. rejected the testimony of a widow called to prove a conversation between herself and her late husband. *Doker v. Hasler, Ry. & M. N. P. C.* 198; *sed vide Beveridge v. Minter*, 1 *C. & P.* 364.

Lawful husband and wife only excluded.] It is only where there has been a valid marriage, that the parties are excluded from giving evidence for or against each other. Therefore on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the husband, for the marriage is void. *B. N. P.* 287. *Bac. Ab. Ev. A.* 1. 1 *East, P. C.* 469.

A woman who has cohabited with a man as his wife, but is not so in fact, is a competent witness for or against him. *Bathews v. Galindo*, 4 *Bingh.* 610. Although in a case of forgery, Lord Kenyon refused to admit a woman as a witness for the prosecutor, whom he had in court represented as his wife; but on hearing the objection to her competency taken, denied his marriage with her. *Anon.* cited by Richards, C. B. *Campbell v. Twemlow*, 1 *Price*, 83. This decision can no longer be considered as law.

Nature of the evidence which the husband or wife is excluded from giving.] It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. It was indeed, in one case laid down as a rule, founded upon a principle of public policy, that a husband and

wife are not permitted to give evidence, which may even tend to criminate each other. *Per Ashurst J. R. v. Cliviger* 2 *T. R.* 268. But in a subsequent case, the Court of King's Bench, after much argument, held that the rule as above stated, was too large, and that where the evidence of the wife did not directly criminate the husband, and never could be used against him, and where the judgment, founded upon such evidence could not affect him, the evidence of the husband was admissible. *R. v. All Saints Worcester*, 1 *Phill. Ev.* 74.

Upon the same principle, where the husband or the wife has been called by one party, the wife or the husband may be called by the other, to contradict the statement, for no advantage can be taken against either party of the contradictory testimony thus given. *See* 1 *Phill. Ev.* 75.

Cases where husband or wife has been held incompetent.] On an indictment for a joint assault against two, it was proposed to examine the wife of one of the defendants in favour of the other, but there having been material evidence given against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants, the Chief Justice refused to let her be examined. *Frederick's case*, 2 *Str.* 1095. On a joint indictment for burglary against two, the wife of one of the prisoners has been held incompetent to prove an *alibi* for the other. Littledale, J. rejected the evidence, on the ground that it would go to show that the witness for the prosecution was mistaken as to one of the prisoners, and would thus weaken his evidence altogether, and benefit her husband. On a case reserved, the judges thought the evidence rightly rejected. *Smith's case*, 1 *Moody, C. C.* 289. *See also Hood's case*, *Id.* 281. So upon an indictment for a conspiracy, the wife of one of the defendants cannot be called as a witness for another defendant. *Locker's case*, 5 *Esp.* 107. Again, upon an indictment for a conspiracy against the wife of W. S. and others, for procuring W. S. to marry, Abbott, C. J. rejected W. S. when called as a witness for the prosecution. *Serjeant's case*, *Ry. & Moo. N. P. C.* 352. But it seems that if the wife has been connected with the commission of the offence, she may be brought into court for the purpose of being identified. This has been decided in the Scotch law, where several prisoners were put to the bar, charged with stronthrief, it was held incompetent to adduce the wife of one against any of the others at the bar, although she was allowed to be brought into court and identified by the other witnesses, as the person who had passed one of the stolen notes. *Law's case*, *Alison, Prac. C. L. Scot.* 533.

It is a settled rule, that in cases of bigamy, the first and lawful wife is not a competent witness; *Grigg's case*, *Sir T. Raym.* 1; although the second wife is, *ante*, *p.* 113. The law is the

same in Scotland. *Alison, Prac. Cr. L.* 463. But the propriety of this exclusion is doubted by an able text writer. "Having once, "he says" for just and necessary reasons, admitted an exception to the general rule, in the case of a wife who has sustained a personal injury from her husband, is there any principle on which it can be held not to include that case where the injury to herself and her family is the greatest, from a desertion of them both by the head of the family? Nor is the reason of exclusion, founded on the peace of families, here of the slightest weight, but rather the reverse; for a husband who has been guilty of bigamy, has proved himself dead to all sentiments of that description, and having already deserted his first wife for another women, he has given the clearest evidence that no farther family dissensions need be apprehended from her appearing to give evidence against him." *Alison, Prac. Cr. L.* 463.

Whether or not the wife is a competent witness against her husband on a charge of treason, appears to have been doubted. In *Grigg's case, T. Raym.* 1, which was an indictment for bigamy, it was said, *obiter*, that the wife could not be a witness against her husband, *except in treason*; but on the other hand it has been asserted that a wife is not bound in case of high treason, to discover her husband's treason; *Brownl. Rep.* 47; and there are many authorities to the same effect which appear to settle the point. 1 *Hale, P. C.* 301, *Hawk. P. C. b.* 2. *s.* 2. *c.* 46. *s.* 182, *Bac. Ab. Evid. A.* 1. *See* 2 *Stark. Ev.* 404, 2*d. ed.* 2 *Russ.* 607, 1 *Phill. Ev.* 79.

Although by stat. 6 G. 4. c. 16. s. 37. commissioners of bankrupts are authorised to summon before them the wife of any bankrupt, and to examine her for the discovery and finding out of the estate of the bankrupt concealed by her, yet she cannot be examined touching the bankruptcy of her husband. 12 *Vin. Ab.* 11. *Ex parte James,* 1 *P. Wms.* 611. Her evidence being admissible only by statute, before the commissioners, she will not be a competent witness for or against her husband, on an indictment against him for concealing his effects.

Cases of personal violence.] It is quite clear that a wife is a competent witness against her husband, in respect of any charge which affects her liberty or person. *Per Hullock, B. Wakefield's case, p.* 157, *Murray's ed.* Thus in *Lord Audley's case,* who was tried as a principal in the second degree, for a rape upon his own wife; the judges resolved that though in a civil case, the wife is not a competent witness, yet that in a criminal case of this nature, being the party grieved, upon whom the crime is committed, she is to be admitted as a wit- against her husband. 3 *How. St. Tr.* 414. 1 *Hale, P. C.* 301. So on an indictment against the husband for an assault upon

the wife. *Azire's case*, 1 *Str.* 633. *B. N. P.* 287. So a wife is always permitted to swear the peace against her husband, and her affidavit has been permitted to be read, on an application to the court of King's Bench, for an information against the husband, for an attempt to take her away by force, after articles of separation. *Lady Lawley's case*, *B. N. P.* 287.

Upon an indictment under the repealed statute 3 Hen. 7. c. 2. for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*. *Fullwood's case*, *Cro. Car.* 488. *Brown's case*, 1 *Vent.* 243. *Naugen Swendsen's case*, 14 *How. St. Tr.* 559. 575. And she was consequently a witness *for* him. *Perry's case*, *coram Gibbs*, 1794, *Hawk. P. C. b.* 2. *c.* 46. *s.* 79, *cited Ry. & Moo. N. P. C.* 353. But a doubt has been entertained, whether, if the woman afterwards assent to the marriage, she is capable of being a witness. In *Brown's case*, (*supra*,) it is said by Lord Hale, that most were of opinion that had she lived with him any considerable time, and assented to the marriage, by a free cohabitation, she should not have been admitted as a witness against her husband. 1 *Hale, P. C.* 302. This opinion appears to be countenanced by the authority of two eminent writers. 1 *Phill. Ev.* 78. 2 *Stark. Ev.* 402, 403. 2*d ed.* But Mr. Justice Blackstone, in his Commentaries, has expressed a contrary opinion. 4 *Com.* 209. And the arguments of Mr. East, on the same side, appear to carry great weight with them. 1 *East, P. C.* 454. In a case before Mr. Baron Hullock, where the defendants were charged, in one count, with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count, with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned judge was of opinion that, even assuming the witness to be at the time of trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the defendant, by his own criminal act, could not exclude such evidence against himself. *Wakefield's case*, 257, *Murray's ed.* 2 *Russ.* 605. 2 *Stark. Ev.* 402. (*n.*) 2*d. edit.*

Upon an indictment under Lord Ellenborough's act, against a man for shooting at his wife, the latter was admitted as a witness by Mr. Baron Garrow, after consulting Holroyd, J. upon the ground of the necessity of the case, and Mr. Justice Holroyd sent Mr. Baron Garrow the case of *R. v. Jagger*, (1 *East, P. C.* 455.) *York Assizes*, 1797, where the husband attempted to poison his wife with a cake, in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband, and Mr. Justice Rooke afterwards delivered the opinion of the twelve judges,

that the evidence was rightly admitted. Mr. Justice Holroyd, however, said that he thought the wife could only be admitted to prove facts which could not be proved by any other witness. 2 *Russ.* 106.

Upon the same principle that the evidence of the wife, if living, would be received to prove a case of personal violence, her dying declarations are admissible in case of murder by her husband. *Woodcock's case*, 1 *Leach*, 500. *John's case*, *Id.* 504. (*n.*) 2 *Russ.* 606. And in similar cases of personal violence, the examinations of the party (husband or wife) murdered, taken before a magistrate, pursuant to the statute, would, as it seems, be admissible against the husband or wife, where the evidence of the husband or wife, if living, would have been admissible. *See M'Nally, Ev.* 175.

ADMISSIBILITY OF ACCOMPLICES.

Accomplices in general . . . 117
Principal felon 118
Accomplice, when evidence for prisoner . . 118
Promise of pardon 119
Effect of accomplice's evidence . . . 119
Confirmation 120
Situation of an accomplice when called as a witness . 121

Accomplices in general.] The evidence of persons who have been accomplices in the commission of the crime with which the prisoner stands charged, is, in general, admissible against him. This rule has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders. *Hawk. P. C. b.* 2. *c.* 46. *s.* 94. Even where the accomplice has been joined in the same indictment with the prisoner, he may still be called as a witness, before he is convicted. *Id. s.* 95. It is said that an accomplice indicted with another is an admissible evidence, *if he be not put upon his trial.* 2 *Stark. Ev.* 11, 2*d ed.* 2 *Russell*, 597. In strictness, however, there does not seem to be any objection to the admitting the witness at any time before conviction. The party that is the witness, says Lord Hale, is never indicted, because that much weakens and disparages his testimony, but possibly does not wholly take away his testimony. 1 *Hale, P. C.* 305. The practice, where the testimony of an accomplice is required to prove the case before the grand jury, and he is in custody, is for the counsel for the pro-

prosecution to move that he be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential. 2 *Stark. Ev.* 11, 2*d ed.* Where the accomplice has been joined in the indictment, and before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted. *Rowland's case, Ry. & Moo. N. P. C.* 401. Where the case has proceeded against all the prisoners, but no evidence appears against one of them, the court will, in its discretion, upon the application of the prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. *Fraser's case*, 1 *M'Nally*, 56. But the judges will not, in general, admit an accomplice, although applied to for that purpose by the counsel for the prosecution, if it appears that he is charged with any other felony than that on the trial of which he is to be a witness. This was stated by Mr. Justice Park in several cases, on the Oxford Spring Circuit, 1826. *Carrington's Supplement*, 67, 2*d ed.*

Where a party had been joined in the indictment, and it was intended to call him as a witness for the prosecution, it was formerly the practice to enter a *noli prosequi* as to him. *Ward v. Man*, 2 *Atk.* 229. Where the defendants were indicted for a conspiracy, to persuade a witness to absent himself from the trial of a person charged with uttering base money, the attorney-general entered a *noli prosequi*, as to two of the defendants, who were then examined for the crown, and on their evidence the others were convicted. *Ellis's case, sitt. after H. T.* 1802, 1 *M'Nal. Ev.* 55.

Principal felon.] Upon an indictment against a receiver, the principal felon, when not convicted, may be admitted as a witness against the defendant. This was allowed on the repealed statute, 22 G. 3. c. 28, *Param's case*, 2 *East, P. C.* 182, 1 *Leach*, 419, (*n.*) *S. C.* and in a prosecution on the statute 4 Geo. 1. c. 11. for taking a reward to help to stolen goods. *Wild's case, Id.* 783, *Haslam's case, Id.* 702, 1 *Leach*, 418.

Accomplice—when competent for prisoner.] It is quite clear that an accomplice, not joined in the indictment, is a competent witness for the prisoner, in conjunction with whom, he himself committed the crime. And even where they are severally indicted for the same offence, the one may be called for the other. If A. B. and C., says Lord Hale, be indicted of perjury, on three several indictments, concerning the same matter, and A. pleads *not guilty*, B. and C. may be examined as witnesses for A., for as yet they stand unconvicted, although they are indicted. *Bulmore's case*, 1 *Hale, P. C.* 305. So it has been adjudged that such of the defendants in an information, against whom no evidence has been given, may be wit-

nesses for the others. *Bedder's case*, 1 *Sid.* 237, *Hawk. P. C. b.* 2. c. 46. s. 98. The practice in this case is to apply to the court to permit the issue, as to the intended witness, to go immediately to the jury, and he being found not guilty, is then a competent witness. *Frazer's case*, 1 *M'Nal. Ev.* 56. Where two were indicted for an assault, and one submitted and was fined 1*s.* and the other pleaded *not guilty*, upon the trial, the chief justice allowed him to call the other defendant, the matter being now at an end as to him. *Fletcher's case*, 1 *Str.* 633. So where, on a joint indictment against two, one of them pleaded in abatement, and there being no replication, he was discharged; he was admitted without objection as a witness for the other defendant. *Sherman's case*, *Cases temp. Hardw.* 303. However, in a case before Lord Ellenborough, in which the foregoing decisions were not cited, his lordship ruled, on an indictment for a misdemeanor, that a defendant who had suffered judgment by default, could not be called by another defendant. "In the case of a joint indictment," he observed, "against several for a joint offence, I have never known this evidence offered, and I think it cannot be admitted. To allow this evidence, would go to every criminal case, for if two were indicted, one, by suffering judgment by default, might protect the other. There is a community of guilt: they are all engaged in an unlawful proceeding; the offence is the offence of all, not the act of an individual only." *Lafone's case*, 5 *Esp.* 154. It may be observed, that the reasons here given would exclude the evidence of an accomplice in every case, when tendered for the prisoner.

Accomplices—promise of pardon.] Although Lord Hale thought that if a man had a promise of pardon if he gave evidence against one of his confederates, this disabled his testimony, 2 *Hale, P. C.* 280, yet it is now fully settled that such a promise, however it may affect the credibility of the witness, will not destroy his competency. *Tonge's case*, *Kelynge*, 18. 1 *Phill. Ev.* 38. The rule is thus laid down by Mr. Serjeant Hawkins. It has been ruled that it is no good exception, that a witness has the promise of a pardon or other reward, on condition of his giving his evidence, unless such reward be promised, by way of contract for giving such and such particular evidence, or full evidence, or any way in the least to bias him to go beyond the truth, which, not being easily avoided, in promises or threats of this kind, it is certain that too great caution cannot be used in making them. *Hawk. b.* 2. *c.* 46. *s.* 135. *Vide ante*, 104, 105.

Accomplice—effect of his evidence.] A conviction on the testimony of an accomplice, uncorroborated, is legal. This point having been reserved in a case tried before Buller, J., the twelve judges were unanimously of opinion that an accom-

plice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone, is perfectly legal. *Atwood's case*, 1 *Leach*, 464. *Durham's case*, *Id.* 478. 1 *Hale*, *P. C.* 304, 305. *Jones's case*, 2 *Campb.* 132. This rule, however, is in practice subjected to much limitation, "Judges," observes Lord Ellenborough, "in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes to." *Jones's case*, 2 *Campb.* 132. So where, on an indictment for highway robbery, an accomplice only was called, the court, though it was admitted that such evidence was legal, thought it too dangerous to permit a conviction to take place, and the prisoners were acquitted. *Jones's and Davis's case*, 1 *Leach*, 479, (*n.*) The practice, therefore, is for the court to direct the jury in such cases to acquit the prisoner, unless in some respects the evidence is confirmed.

Accomplice—effect of his evidence—confirmation.] Although in practice, in order to give it effect, the evidence of an accomplice requires confirmation, it is obvious that it cannot be required to be confirmed in every particular, for if that were requisite, his testimony would be better omitted altogether. Even in Scotland, where the evidence of an accomplice unsupported is insufficient to convict, a confirmation of his testimony on certain parts of the case is all that is required. "The true way," says an eminent writer on the criminal law of Scotland, "to test the credibility of a *socius* is, to examine him minutely as to small matters, which have already been fully explained by previous, unsuspected witnesses, and on which there is no likelihood that he could think of framing a story, nor any probability that such a story, if framed, would be consistent with the facts previously deposed to by unimpeachable witnesses. If what he says coincides with what has previously been established, in the seemingly trifling, but really important matters, the presumption is strong that he has also spoken truly in those more important points which directly concern the prisoner; if it is contradicted by these witnesses, the inference is almost unavoidable, that he has made up a story, and is unworthy of credit in any particular." *Alison's Prac. of the Crim. Law of Scotl.* 157. Where, on the trial of several prisoners, an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest, Bayley, J. informed the jury that if they were satisfied by the confirmatory evidence, that the accomplice was a credible witness; they might act upon his testimony with respect to others of the defendants, though as far as his evidence affected them, he had received no confirmation; and all

the defendants were convicted. *Dawber's case*, 3 *Stark. N. P. C.* 34. Upon the same principle the judges held that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to other particulars of his story. *Birkett's case*, *Russ. & Ry.* 251, but *see Mr. Starkie's observations*, 2 *Ev.* 12, (*n.*) In a late case, Patteson, J. is reported to have said, "The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner." *Addis's case*, 6 *C. & P.* 388.

Accomplices—situation of an accomplice when called as a witness.] Where a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices in the same crime, this practice, which was termed approvement, and which was only admitted at the discretion of the court, entitled him to pardon. But as the practice of *appeal* in cases of treason and felony is now abolished, (69 Geo. 3. c. 46.) this consequence of it has also ceased.

The practice now adopted is, for the magistrate before whom the accomplice is examined, or for the court before which the trial is had, to direct that he shall be examined, upon an understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. But this understanding cannot be pleaded by him in bar of an indictment, nor can he avail himself of it at his trial, for it is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the party time to apply elsewhere. *Rudd's case*, *Cowp.* 331, 1 *Leach*, 115. *S. C.* After giving his evidence, but not in such a way as to entitle him to favour, an accomplice may still be indicted for the same offence, and though he may have conducted himself properly, he is liable to be proceeded against for *other* offences. Thus, where an accomplice was admitted to give evidence against a prisoner for receiving stolen goods, and the latter was convicted; and the witness was afterwards prosecuted in another county for horse stealing, and convicted; a doubt arising whether this case came within the equitable claim to mercy, it was referred to the judges, who were unanimously of opinion, that the pardon was not to extend to offences for which the prisoner might be liable to prosecution out of the county, and the prisoner underwent his sentence. *Duce's case*, 1 *Burn's Justice*, 211. 24*th ed.* So where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary,

Garrow, B. submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge, whether to recommend a prisoner in such a case to mercy. *Lee's case, Russ. & Ry.* 364, 1 *Burn*, 212. *Brunton's case, Id.* 454. *S. P.* With respect to other offences, therefore, the witness is not bound to answer on his cross-examination. *West's case*, 1 *Phill.* 37, (*n.*) A prisoner who, after a false representation made to him by a constable in gaol, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession, and the conviction was approved of by all the judges. *Burley's case*, 2 *Stark. Ev.* 12, (*n.*) It is not a matter of course, to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates, but an application to the court for the purpose must be made. 1 *Phill. Ev.* 38.

In Scotland, the course pursued with regard to an accomplice who has been admitted against his confederates differs from that adopted by the English law, and seems better calculated to further the ends of justice. "It has long been an established principle of our law," says Mr. Alison, "that by the very act of calling the *socius*, and putting him in the box, the prosecutor debars himself from all title to molest him for the future, with relation to the matter libelled. This is always explained to the witness by the presiding judge as soon as he appears in court, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. If, therefore, on any future occasion, the witness should be subjected to a prosecution, on account of any of the matter contained in the libel, on which he was examined, the proceedings would be at once quashed by the supreme court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated, by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box, but it would be much more put in hazard, if the witness was sensible that his future safety depended on the extent to which he spoke out against his associate at the bar. The only remedy, therefore, in such a case is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of these proceedings." *Alison, Prac. Cr. Law of Scotl.* 453.

EXAMINATION OF WITNESSES.

Ordering witnesses out of Court . . . 123
At what time the objection to the competency of witnesses must be taken 124
Voire dire 125
Examination in chief 126
Cross-examination 127
Re-examination 128
Questions subjecting witness to a civil suit . . 129
to a forfeiture . . . .
to penalties or punishment whether such question may be put 130
consequence of answering . . . 132
consequence of not answering . . . 132
objection must be taken by witness himself . 133
Questions tending to degrade . . . 134
Evidence of general character . . . 135
When a party may contradict his own witness . 136
Examination as to opinion . . . 137

Ordering witnesses out of court.] In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court. It is said, that with regard to a prisoner, this is not a matter of right. 1 *Stark. Ev.* 163, 4 *St. Tr.* 9. Perhaps, in all cases, it may be regarded as matter of discretion in the court. The rule has been held not to extend to the attorney in the cause, who may remain, and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the cause. *Pomeroy v. Baddeley, Ry. & Moo. N. P. C.* 430. Though in one case, Best J. ruled the other way. *Webb's case, Sarum Summ. Ass.* 1821, 1 *Stark. Ev.* 63. 2*d ed.* It does not, however, appear, that in this case, application was made to allow the witness to remain. *Ry. & Moo. N. P. C.* 431. So as it seems, a physician, or other professional person who is called to give an opinion as a matter of skill, upon the circumstances of the case, may be allowed to remain. By the law of Scotland, a medical witness is directed to remain in court during the trial, till the medical *opinion* of other witnesses begins. *Alison's Prac. Crim. Law of Scotl.* 489.

If a witness remains in court after an order made for the wit-

nesses on both sides to withdraw, it is an inflexible rule in the Court of Exchequer, that such a witness shall not be allowed to be afterwards examined. *Att.-Gen. v. Bulpit*, 9 *Price*, 4. But that rule does not obtain in the other courts, and it is for the judge at the trial to say, whether under all the circumstances of the case, he will relax the order which has been given. *Parker v. M'William*, 6 *Bingh.* 683, *R. v. Colley, Moo. & Malk.* 329. This is said to have been so ruled by Bayley J. in a criminal case, on the Northern circuit, after consulting with Holroyd J. *Moo. & M.* 329.

Where all the witnesses had been ordered out of court, but one of them came into court and heard the evidence of another witness, Taunton J. allowed him to be examined as to such facts, as were not spoken to by the other witness. *Beamon v. Ellice*, 4 *C. & P.* 585. But in a very late case, it was said by Park J., that in a criminal case, he would always reject a witness remaining in court, after all the witnesses on both sides had been ordered to leave it. *Wyld's case*, 6 *C. & P.* 380.

At what time the objection to the competency of a witness must be taken.] It was formerly considered necessary to take the objection to the competency of a witness, on the *voire dire*, and if once examined in chief, he could not afterwards be objected to on the ground of interest; *Lord Lovat's case*, 9 *St. Tr.* 699. 646, 704, 1 *Phill. Ev.* 254; but in modern practice the rule has been much relaxed. The examination of a witness, to discover whether he be interested or not, is frequently to the same effect as his examination in chief, so that it saves time, and is more convenient to let him be sworn in the first instance in chief; and in case it should turn out that he is interested, it is then time enough to take the objection. *Per Buller J., Turner v. Pearte*, 1 *T. R.* 719. *Pengal v. Nicholson, Wightw.* 64. So in *Stone v. Blackburne*, 1 *Esp.* 37, it was said by Lord Kenyon, that objections to the competency of witnesses never come too late, but may be made in any stage of the cause. It should be observed, however, that where the objection is taken upon the examination in chief, or cross-examination, the privilege of examining the party to the contents of a written instrument not produced, is not allowed, as upon an examination on the *voire dire*. *Howel v. Lock*, 2 *Camph.* 14.

Although in general the competency of a witness may be objected to at any stage of a case, yet an objection to the admissibility of a witness in high treason, on the ground that he is not properly described in the list of witnesses furnished to the prisoner, in pursuance of the statute 7 Ann. c. 21. § 14., must be taken in the first instance, otherwise the party might take the chance of getting evidence, which he liked, and if he disliked it, might afterwards get rid of it on the ground of misdescription. *Watson's case*, 2 *Stark.* 158. Upon this principle an emi-

nent writer founds an opinion, that a party who is cognizant of the interest of a witness, at the time he is called, is bound to make his objection in the first instance. *Stark. Ev. part. IV. p.* 757. After a witness has been examined, and cross-examined, and has left the box and is recalled, for the purpose of having a question put to him, it is too late to object to his competency. *Beeching v. Gower, Holt, N. P. C.* 314.

Voire dire.] The party against whom a witness is called, may examine him respecting his interest on the *voire dire*, or may call other witnesses, or adduce other evidence in support of the objection; the modern rule being, that if the fact of interest be satisfactorily proved, the witness will be incompetent, though he may have ventured to deny it on the *voire dire*. If the opposite party raise the objection of interest by independent evidence, and without putting a question to the witness, then the party who has called him cannot be allowed to put a question to him, in order to repel the objection. 1 *Phill. Ev.* 123. A person may be examined on the *voire dire*, as to the contents of a written instrument without its being produced, but if he produces the instrument, it must be read. *Butler v. Carver*, 2 *Stark.* 494.

When the objection to the admissibility of a person tendered as a witness arises solely on his own examination on the *voire dire*, the objection may be removed in the same manner as it was raised, namely, by the statement of the party himself, without calling for the instrument by which, in fact, his competency was restored. Thus, where a witness was objected to as next of kin in an action by an administrator, but on re-examination stated that he had released all his interest, the objection was held by Lord Ellenborough to be removed. *Ingram v. Dade*, 1817, 1 *Phill. Ev.* 124. But where the objection is attempted to be removed, not by the statement of the party called, but by other testimony, the case is governed by the usual rules of evidence. Thus, if another witness is called to prove that the party supposed to be interested, has in fact been released, such release must be produced. *Corking v. Jarrard*, 1 *Campb.* 37. So where it appears by any other evidence than that of the party called himself, that he is incompetent, though the objection is taken at the time of the *voire dire*, it cannot be answered by the statement of the witness alone, but the facts in answer must be proved according to the usual course of evidence. *See Botham v. Swingler*, 1 *Esp. N. P. C.* 164. Thus, where in an action by the assignees of a bankrupt, the bankrupt was himself called and objected to, but stated that he had obtained his certificate, which he did not produce, Best, C. J. ruled, that both his release and certificate must be produced; that it was not like the case of an objection raised by secondary evidence on the *voire dire*, which might be removed by the same descrip-

tion of evidence. *Goodhay v. Hendry*, *M. & M.* 319. In a similar case, Tindal C. J. said, the difficulty is, that the objection does not arise upon the *voire dire*, it appearing from the opening of the case for the plaintiffs, and from the pleadings themselves, that the witness is a bankrupt, and not merely from questions put to him when he comes into the box. *Anon. M. & M.* 321. (*n.*) In one case, however, the point was otherwise decided by Mr. Justice Park, who permitted the bankrupt to give parol evidence of his certificate and release, without producing them. *Carlisle v. Eady*, 1 *C. & P.* 234.

Examination in chief.] When a witness has been sworn, he is examined in chief by the party calling him. Being supposed to be in the interest of that party, it is a rule, that upon such examination, leading questions shall not be put to him. Questions to which the answer, Yes, or No, would not be conclusive upon the matter in issue, are not in general objectionable. It is necessary to a certain extent, to lead the mind of the witness to the subject of the inquiry. *Per Ld. Ellenborough, Nicholls v. Dowding*, 1 *Stark.* 81. Thus, where the question is whether A. & B. were partners, a witness may be asked whether A. has interfered in the business of B. *Id.* So where a witness being called to prove a partnership, could not recollect the names of the component members of the firm, so as to repeat them without suggestion, Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness, whether certain specified persons were members of the firm. *Acerro v. Petroni*, 1 *Stark.* 100. So for the purpose of identification, a particular prisoner may be pointed out to the witness, who may be asked whether he is the man. *De Benger's case*, 1 *Stark. Ev.* 125. 1*st ed.* 2 *Stark. N. P. C.* 129. (*n.*) And in *Watson's case*, 2 *Stark. N. P. C.* 128, the court held that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called, Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 *Camph.* 43.

Upon the same principle, viz. the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary, in order to establish a

contradiction. Thus where counsel, on cross-examination, asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denying having used them, the counsel called a person to prove that he had, and read to him the particular words from his brief, Abbott, C. J. held that he was entitled to do so. *Edmonds v. Walter*, 3 *Stark. N. P. C.* 8. The propriety of admitting leading questions to this extent, has been questioned by Mr. Phillipps. "Upon the whole," he observes, "the most unexceptionable and proper course appears to be, to ask the witness who is called to prove a contradictory statement, made by another witness, what that other witness said relative to the transaction in question, or what account he gave; and not in the first instance to ask in the leading form, whether he said so and so, or used such and such expressions." 1 *Phill. Ev.* 257.

Where a witness, examined in chief, by his conduct in the box shows himself decidedly adverse to the party calling him, it is in the discretion of the judge to allow him to be examined, as if he were on cross-examination. *Bastin v. Carew, Ry. & Moo. N. P. C.* 127. *Clarke v. Saffery, Id.* 126. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held by Best, C. J. that the counsel may, as a matter of right, cross-examine him. *Clarke v. Saffery, Ry. & Moo. N. P. C.* 126. Somewhat similar to this, is the question whether, where a witness, called for one party, is afterwards called by the other, the latter party may give his examination the form of a cross-examination; and it has been held that he may; for, having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. *Dickenson v. Shee*, 4 *Esp.* 67. 1 *Stark. Ev.* 162. 2*d edit.*

Cross-examination.] The form of a cross-examination depends, in a great degree, like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. *See* 1 *Phill. Ev.* 261. But if, on the other hand, he betrays a desire to serve the party who cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner, is very unsatisfactory and open to much remark. *See* 1 *Stark. Ev.* 162. 2*d edit.* The rule with regard to putting leading questions on cross-examination, was thus laid down by Mr. Justice Buller. "You may lead a witness upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the wit-

ness's mouth the very words he is to echo back again." *Hardy's case*, 24 *How. St. Tr.* 755.

Irrelevant questions will not be allowed to be put to a witness on cross-examination, although they relate to facts opened by the counsel on the other side, but not proved in evidence. *Lucas v. Novosilieski*, 1 *Esp.* 297. Nor will such questions be allowed to be put for the purpose of discrediting the witness, by calling other testimony to contradict him. *Vide post*, *p.* 139. Thus on a trial for usury, the defendant's counsel proposed to cross-examine one of the plaintiff's witnesses, to certain transactions which he had had with third persons, but Lord Ellenborough refused to permit the question to be put, and the court held that he was right, observing, that it had been decided over and over again, that on cross-examination to try the credit of a witness, only general questions could be put, and that he could not be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. *Spenceley v. Willott*, 7 *East*, 108.

Counsel cannot assume that a witness has made a statement on his examination in chief, which he has not made; *Hill v. Coombe, MS. Mann. Dig. N. P.* 337; or put a question which assumes a fact not in proof. *Doe v. Wood*, *Id.*

Where a witness is called merely to produce a document, which can be proved by another, and he is not sworn, he is not subject to cross-examination. *Simpson v. Smith*, 1822, *cor. Holroyd J.* 1 *Phill. Ev.* 160. *and per Bayley J.* 1824. 1 *Stark. Ev.* 179. 2*d ed. Davis v. Dale, Moo. & Malk.* 514. Thus where, on an indictment for perjury, a sheriff's officer had been subpœnaed to produce a warrant of the sheriff, after argument he was ordered to do so, without having been sworn. *Murlis's case, Moo. & Malk.* 515. And where a person, called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smith*, 1 *Crom. M. & R.* 94.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject matter of the cross-examination. 1 *Stark. Ev.* 179. 2*d edit.* The rule with regard to re-examinations is thus laid down by Abbott C. J. in *the Queen's case*, 2 *Br. & Bingh.* 297. "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions

or the motives of the witness." "I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject matter of the suit, are in themselves evidence against him, in the suit; and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion."

Questions subjecting witness to a civil suit.] Whether a witness was bound to answer questions which might subject him to a civil action, or charge him with a debt, was formerly much doubted; but by statute 46 Geo. 3. c. 37, it is *declared* and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty or any other person. The statute does not extend to compel parties, who stand in the situation of parties to the suit (as a rated inhabitant, in case of an appeal,) to give evidence. *R. v. Inhabitants of Woburn*, 10 *East*, 395. (*decided before the passing of the 5th Geo.* 3. *c.* 170.

Questions subjecting witness to a forfeiture.] A witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. The declaratory statute (46 Geo. 3. c. 37. *supra.*) implies that a witness may legally refuse to answer any question which has a tendency to a forfeiture of any nature whatsoever. 1 *Phill. Ev.* 264. So it is an established rule in courts of equity, that a party is not bound to answer, so as to subject himself to any forfeiture of interest. *Id. Mitford on Eq. Pl.* 157—163.

Questions subjecting witness to penalties or punishment, &c.] A witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. 1 *Phill. Ev.* 262. Thus

in an action for a libel, in the shape of an extra-judicial affidavit sworn before a magistrate, the clerk to the magistrate was not compelled to answer the question, whether he had written the affidavit at the desire of the defendant, on the ground that it tended to criminate himself. *Maloney v. Bartley*, 3 *Campb.* 210. So on an appeal against an order of bastardy, a person cannot be compelled to confess himself the father of a bastard child. *R. v. St. Mary, Nottingham*, 13 *East*, 58. (*n.*) Nor can the prosecutrix, on an indictment for rape, be compelled to answer a question, whether she has had criminal intercourse with a particular individual. *Hodgson's case, Russ. & Ry. C. C.* 211. Upon the same principle, an accomplice who is admitted to give evidence against his associates in guilt, though bound to make a full and fair confession of the whole truth, respecting the subject matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not connected with the prisoner, for he is not protected from a prosecution for such offences. *West's case, O. B.* 1821. 1 *Phill. Ev.* 37. (*n.*) 263. So a witness cannot be called upon to answer a question which subjects him to the penalties of usury. *Cates v. Hardacre*, 3 *Taunt.* 424. *See Jackson v. Benson*, 1 *Y. & J.* 32.

It is not necessary, in order to render the question objectionable, that it should directly criminate the witness; it is sufficient if it has a tendency to do so. Thus where there was a question whether there had been usury in a bill of exchange, a witness being asked whether the bill had ever been in his possession before, objected to the question, and Mansfield, C. J. refused to compel him to answer the question, observing that it went to connect the witness with the bill, and might be a link in a chain. *Cates v. Hardacre*, 3 *Taunt.* 424. Lord Eldon also, in *Pacton v. Douglas*, 19 *Ves.* 227. expressed an opinion that a party should be protected from questions, not only that have a direct tendency to criminate him, but that form one step towards it. See also *Claridge v. Hoare*, 14 *Ves.* 59, *Swift v. Swift*, 4 *Hagg. Eccl. R.* 154.

Questions subjecting a witness to penalties or punishment, &c. —whether they may be put.] Whether questions, the answers to which would expose the witness to punishment, ought not to be allowed to *be put*, or whether the witness ought merely to be protected from *answering* such questions, does not appear to be settled. In *Reading's case*, 7 *How. St. Tr.* 226. it was decided that a question tending to charge a witness with a criminal offence ought not to be put, although he had been pardoned. Lord Chief Justice North said, "If he hath not his pardon, his life is in danger; if he hath, neither his life nor name must suffer, and therefore such questions must not be asked him." Although this decision has been remarked

upon, and it has been said that it ought not to be considered binding, from the nature of the trial and the period at which it took place, (*see Moo. & Malk. N. P. C.* 493, *n.*) yet that observation must, it seems, be confined to the rejection of the question after the witness had been pardoned. In *Cundell v. Pratt, Moo. & M.* 108, where the witness was asked whether she had been guilty of incest with a particular individual, Best, C. J. *prohibited the question.* So where on a trial for high treason, one of the witnesses was asked a question tending to show that he had been guilty of bigamy, in order to discredit him, Lord Ellenborough observed, " You may ask the witness whether he has been guilty of such a crime, *this indeed would be improperly asked*, because he is not bound to criminate himself; but if he does answer promptly, you must be bound by the answer which he gives." *Watson's case*, 2 *Stark. N. P. C.* 151. *sed vide post.*

On the other hand, there are not wanting authorities to show that even where the question goes to criminate the witness, it may yet be put, although he cannot be compelled to answer it. This appears to have been the opinion of Bayley, J. in *Watson's case*, 2 *Stark. N. P. C.* 153. And the same learned judge is said to have ruled that a witness may be asked a question the answer to which may subject him *to punishment*, but that he is not compellable to answer it; and that all other questions for the purpose of impeaching a witness's character, may not only be put, but must be answered. *Holding's case, O. B.* 1821, *Archb. C. L.* 102. 2*d edit.* It may, however, be doubted, how far this decision is correctly reported, especially with regard to the concluding position. In a text book of great value, it is said that it seems such questions may be put. 2 *Russ.* 625, 6. 2*d ed.* In the same work it is added, that if the imputation contained in the question be so connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited *must* be asked whether he has been guilty of the offence imputed.

Upon principle it would seem that questions tending to expose the witness to *punishment*, may be *put*, as well as questions tending to degrade his character. The ground of objection in the first case is not that the question has a tendency to degrade him, but that advantage may be taken of his answer in some future proceeding against him, and the rule that no person is bound to accuse himself is urged. This objection is however completely removed by permitting the witness not to answer the question, for his silence would not in any future proceeding be any admission of guilt. The question may then be regarded as one simply tending to degrade the witness, and would come within the rule which appears to be now well established, that it may be *put*, though the witness is not com-

pellable to give an answer, or that if he does give an answer, the party examining him must be satisfied with it.

This point appears to have been settled in the law of Scotland, by recent determinations; and it is now held in that country, that it is competent to ask a witness whether he has been engaged in any *specific* crimes, although they have no connexion with the crime under investigation; but it is also held to be the privilege of the witness to decline answering, according to the rule *Nemo tenetur jurare in suum turpitudinem.* In the case of the Cupar rioters, a witness was asked whether he had ever been engaged in the lifting of dead bodies. *Lindsay's case,* 1829, *Alison's Pract. Cr. Law of Scotl.* 527. And in *Burke's case, Syme,* 365, 367, *Alison,* 527, the court allowed Hare, the witness, to be asked whether he had ever been engaged in any other murder, expressly warning him that he was at liberty to decline answering, which he accordingly did.

Questions subjecting a witness to penalties, punishment, &c.—consequence of answering.] Answers given to questions to which the witness might have demurred, may be given in evidence against him. *Smith v. Beadnell,* 1 *Camph.* 30. If the witness answers questions on the examination in chief, tending to criminate himself, he is bound to answer on the cross-examination, though the answer may implicate him in a transaction affecting his life. *Per Dampier J. Winchester Sum. Ass.* 1815, *Mann. Dig. pl.* 222, *Witness, p.* 336. 2*d ed.* So, if the witness begins to answer, he must proceed. On a trial for libel, a witness was asked whether he had not furnished the editor of a newspaper with the report. He answered one or two questions on the subject, when, being further pressed, he appealed to the court for protection, but Abbott, C. J. said, "You might have refused to answer at all, but having partially answered, you are now bound to give the whole truth." *East v. Chapman, M. & M.* 47, 2 *C. & P.* 571. *S. C.* So Best, C. J. laid it down, that if a witness, being cautioned that he is not compellable to answer a question which may tend to criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction. *Dixon v. Vale,* 1 *C. & P.* 279. *See also Austin v. Poiner,* 1 *Simons,* 348.

Questions subjecting a witness to penalties or punishment, &c.—consequence of not answering.] Where a witness is entitled to decline answering a question, and does decline, the rule is said by Holroyd J. to be, that his not answering can have no effect with the jury. *Watson's case,* 2 *Stark.* 157. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott C. J. interposed and said, that no inference

was to be drawn from such refusal. *Rose v. Blakemore, Ry. & Moo. N. P. C.* 384. A similar opinion was expressed by Lord Eldon. *Lloyd v. Passingham*, 16 *Ves.* 64. *See the note Ry. & Moo. N. P. C.* 385. However, it is said by Bayley J. in *Watson's case*, 2 *Stark.* 153, "If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness, whether he has committed a particular crime, it would perhaps be going too far to say, that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

Questions subjecting witness to penalties or punishment, &c.—objection must be taken by the witness himself.] The privilege of objecting to a question, tending to subject the witness to penalties or punishment, belongs to the witness only, and ought not to be taken by counsel, who will not be allowed to argue it. *Thomas v. Newton, M. & M.* 48.

Whether a witness is bound to answer questions tending to degrade him.] The point has frequently been raised and argued, whether a witness, whose credit is sought to be impeached on cross-examination, is bound to give an answer to the questions put to him with that view. The doubt only exists where the questions put are not relevant to the matter in issue, but are merely propounded for the purpose of throwing light on the witness's character; for if the transactions to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character. 1 *Phill. Ev.* 265.

The first point to be considered on this subject is, whether questions not relevant to the matter in issue, and tending to degrade the character of the witness, are allowed to be put. There does not appear to be any authority in the earliest cases for the position, that the questions themselves are inadmissible upon cross-examination. In *Cook's case*, 13 *How. St. Tr.* 334, Treby C. J. appears to admit the legality of the practice, adding, that the witnesses have not been obliged to answer. In *Sir John Friend's case*, 11 *How. St. Tr.* 1331, the court held that a witness could not be asked whether he was a Roman Catholic, because he might by his answer subject himself to severe *penalties*. In *Layer's case*, 16 *How. St. Tr.* 121, a question tending to degrade the witness was proposed to be asked on *the voire dire*, and Pratt C. J. said, "It is an objection to his credit, and if it goes to his credit, must he not be sworn, and his credit go to the jury?" These therefore are only authorities, to show that a witness will not be *compelled to answer* such questions. Many later decisions show that such questions are admissible, though the witness cannot be called upon to answer them. Thus, on an application to bail a prisoner, the court allowed the counsel for the prosecution to ask one of the bail,

whether he had not stood in the pillory for perjury. The Court said there was no objection to the question, as the answer could not subject the bail to any punishment. *Edwards' case*, 4 *T. R.* 440. On *Watson's case* for high treason, such questions were frequently asked, "and it may be inferred," says Mr. Phillipps, "from the opinion of the judges on an argument in that case, that such questions are regular." *Gurney's report of Watson's trial*, 288—291. 1 *Phill. Ev.* 269. (*n.*) *See also Lord Cochrane's trial*, 419, *by Gurney*. *Hardy's case*. 24 *How. St. Tr.* 726. 11 *East*, 311. So it is stated by Mr. Phillipps, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation. In the following case, Best C. J. laid down the same rule in these words: "The rule I shall always act upon is, to protect witnesses from questions, the answers to which would expose them to punishment; if they are protected beyond this, from questions which tend to degrade them, many an innocent man may suffer." *Cundell v. Pratt, M. & M.* 108.

There are, however, one or two decisions, countenancing the opinion that questions tending to degrade the character of a witness, shall not be allowed to be put. Upon an indictment for an assault, a common informer and man of suspicious character having been called, was asked on cross-examination, whether he had not been in the house of correction. Upon this Lord Ellenborough interposed, and said that *the question should not be asked*. That it had been formerly settled by the judges, among whom were chief Justice Treby and Mr. Justice Powell, both very great lawyers, that a witness was *not bound to answer* any question, the object of which was to degrade, or render him infamous. He added, that he thought the rule ought to be adhered to, as it would be an injury to the administration of justice, if persons who came to do their duty to the public might be subjected to improper investigation. *Lewis's case*, 4 *Esp.* 225. Upon this case it may be observed, that the authorities referred to by Lord Ellenborough do not go the length of excluding the *question*, but merely decide that the witness is not bound to answer. As already stated also, Lord Ellenborough was in the frequent habit of allowing such questions to be put, *supra*, and on these grounds Mr. Phillipps is disposed to think that the question had already been put and answered, and being repeated, his lordship thought it necessary to interpose for the protection of the witness. 1 *Phill. Ev.* 269 (*n.*) In another case, where a witness was asked on cross-examination, whether she lived in a state of concubinage with the plaintiff, Lord Alvanley interposed, and gave the following opinion on the subject of such questions: "He thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness; he would therefore allow it to be asked, whether she was married, as she

might be married to the plaintiff. But having said she was not, he would not allow it to be asked, had she slept with him?" He added, "I do not go so far as others may. I do not say that a witness may not be asked to what may tend to disparage him, that would prevent an investigation into the character of the witness, which may often be of importance to ascertain. I think those questions only should not be put which have a direct or immediate effect to disgrace or disparage the witness." *Macbride v. Macbride*, 4 *Esp.* 242. Upon an indictment for a rape, the prosecutrix on cross-examination was asked, "Whether she had not before had connexion with other persons, and whether not with a particular person (named)." This question was objected to, and the point was reserved for the opinion of the judges, who held the objection good. *Hodgson's case*, *Russ. & Ry. C. C.* 211. It does not appear in the latter case, whether the question itself was objected to, or only that the witness was not bound to answer it, but both in this and the preceding case of *Macbride v. Macbride*, it seems that the questions were improper to *be put*, as they imputed to the witness *an offence* punishable by the ecclesiastical law. Upon the same ground, Best C. J. interposed to prevent a witness being asked whether she lived in a state of incestuous concubinage with a particular person. *Cundell v. Pratt*, *M. & M.* 108. Where, in an action for seduction, the party seduced was asked whether she had not been criminal with other men, Lord Ellenborough said, this was a question she ought not to answer, and that the same point having been referred to the judges, they were all of the same opinion. *Dodd v. Norris*, 3 *Campb.* 519.

With regard to *compelling* a witness to answer questions tending to degrade him, (such questions not being relevant to the matter in issue,) there appear to be only two authorities that a witness is so bound. In *Holding's case*, *O. B.* 1821, *Arch. Cr. Pl.* 102. 2*d ed.*, Bayley J. is reported to have ruled, that though a witness may refuse to answer a question exposing him to punishment, yet all other questions, for the purpose of impeaching his character, may not only be put, but must be answered. So where in a civil cause, a witness being asked on cross-examination, whether he had not been tried for theft, refusing to answer, and appealing to Lord Ellenborough, whether he was bound to answer, his lordship said; "If you do not answer the question I will commit you," adding, "you shall not be compelled to say whether you were guilty or not." *Frost v. Holloway*, 1818, 1 *Phill. Ev.* 269 (*n.*)

Evidence of general character.] Where a witness is called to impeach the general character for veracity of another witness, he cannot be examined as to particular facts. The proper question is, "From your knowledge of his general character, would you believe him on his oath?" If the witness state that

he has seen him before a magistrate, and from what passed there he would not believe him on his oath, it is not evidence. *Mawson v. Hartsink*, 4 *Esp.* 102. "The rule is," says Mr. Justice Bayley, "that a party against whom a witness is called, may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him." *Watson's case*, 2 *Stark. N. P. C.* 152. "The reason," says Pratt C. J., "why particular facts are not to be given in evidence, to impeach the character of a witness is, that if it were permitted, it would be impossible for a witness having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the character of witnesses might be vilified, without their having any opportunity of being vindicated." *Layer's case*, 14 *How. St. Tr.* 285. But no such injustice attends an inquiry into the general character of a witness. "General character," says Chief Justice Gibbs, "is the result of general conduct, and every witness who presents himself in a court of justice undertakes for that." *Sharp v. Scoging, Holt's N. P. C.* 541. In answer to general evidence of bad character for veracity, the witnesses called to prove it may be examined as to their means of knowledge. *Mawson v. Hartsink*, 4 *Esp.* 103.

When a party may contradict his own witness.] Where a witness is called, and makes statements contrary to those which are expected from him, the party calling him may prove the facts in question by other witnesses. *Alexander v. Gibson*, 2 *Campb.* 555. *Lowe v. Joliffe*, 1 *W. Bl.* 365. *Ewer v. Ambrose*, 3 *B. & C.* 748. And where a witness is contradicted by the party calling him, as to certain facts, it is not necessary that the remainder of his evidence should be repudiated. *Bradley v. Ricardo*, 8 *Bingh.* 57. It is clear that the party calling a witness, will not be allowed to give general evidence that he is not to be believed on his oath. *Ewer v. Ambrose*, 3 *B. & C.* 748. *Bull. N. P.* 297.

Whether the party calling a witness, who gives evidence contrary to what is expected from him, may prove contradictory statements previously made by the witness, does not appear to be well settled. Where a witness made such a statement, and the party calling him proved a contradictory statement made by the witness in an answer to a bill in chancery, the Court of King's Bench held, that the judge had improperly left it to the jury to say whether they believed the witness's statement at the trial, or that in his answer; the latter, at all events, not being evidence of the facts stated in it. *Ewer v. Ambrose*, 3 *B. & C.* 746. In this case Holroyd J. observed, "The answer might, perhaps, be admissible, if the effect of it only were to show that as to the particular fact sworn to at the trial, the witness was mistaken. But if its effect were to show that the witness was

not worthy of credit, then it was not admissible." *Id.* 750. Where the prisoner's mother, whose name was on the back of the indictment, was, by the direction of the judge, called as a witness for the prosecution, and her evidence was in favour of the prisoner, and materially differing from her deposition before the coroner, the judge thought it proper to have that deposition read, and stated to the jury that her testimony was not to be relied upon. The point being reserved for the opinion of the judges, they were all of opinion, that under the circumstances of the case, it was competent to the judge to order the depositions to be read, to impeach the credit of the witness. Lord Ellenborough and Lord Chief Justice Mansfield thought that the prosecutor had the same right. *Oldroyd's case, Russ. & Ry. C. C.* 88. And in a late case, where, in an action of trespass, one of the witnesses for the plaintiff swore contrary to the statement which he had made before the trial to the plaintiff's attorney, Denman, C. J. permitted the latter to prove the contradictory statement. *Wright v.* ——, *Lanc. Sum. Ass.* 1833. An opinion, adverse to the right of a party calling a witness to contradict him, by his own previous statement, is expressed by a writer of great authority. 1 *Phill. Ev.* 294. And this opinion appears to have been followed by other text writers. 2 *Russ.* 636.

Examination as to opinion.] Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* only, yet where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is. Thus, an engineer may be called to say what, in his opinion, was the cause of an harbour being blocked up. *Folkes v. Chad*, 3 *Dougl.* 157, 1 *Phill. Ev.* 276, 4 *T. R.* 498, *S. C. cited.* In a variety of other cases also, such evidence has been admitted. "Many nice questions," observes Lord Mansfield, "may arise as to forgery, and as to the impression of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." *Foulkes v. Chad*, 3 *Dougl.* 159. So the opinion of a ship-builder, on a question of sea-worthiness. *Thornton v. Roy. Exch. Ass. Co. Peake, N. P. C.* 25. *Chapman v. Walton*, 10 *Bingh.* 57.

It is the constant practice to examine medical men as to their judgment with regard to the cause of a person's death, who has suffered violence; and where, on a trial for murder, the defence was insanity, the judges to whom the point was referred, were all of opinion that in such a case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a

paroxysm of that disorder in a person subject to it? Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz. whether from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *Wright's case, Russ. & Ry.* 456.

A question may arise in these cases, whether, where a witness, a medical man, called to give his opinion as matter of skill, has made a report of the appearances or state of facts at the time, he may be allowed to read it as part of his evidence. The practice in Scotland on this point is as follows. The scientific witness is always directed to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a further examination by the prosecutor, or to a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions made to him by the prisoner, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and can only refer to the memoranda to refresh his memory. *Alison, Prac. Cr. Law of Scotland*, 541.

In proving the laws of foreign countries also, the opinions of competent witnesses are admissible. The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill; but where the laws are in writing, a copy, properly authenticated, must be produced. *Per Gibbs, C. J., Millar v. Kendrick*, 4 *Camp.* 155. *But see Boehtlinck v. Schneider*, 3 *Esp.* 58. Thus on the trial of the Wakefields, for abduction, a gentleman of the Scotch bar was examined, as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the law of Scotland. *Wakefield's case, Murray's ed. p.* 238. So it is laid down by a foreign writer of eminence, that foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. *Story's Com. on the Conflict of Laws*, 530.

CREDIT OF WITNESSES—HOW IMPEACHED AND SUPPORTED.

General rules, &c. 139
Credit impeached by irrelevant questions on cross-examination 139
by relevant questions,—contradiction by other witnesses 140
Proof of former declarations in support of credit of witness 142

Credit of witnesses, how impeached—General rules.] The credit of a witness may be impeached, either simply by questions put to him on cross-examination, or by calling other witnesses to impeach his credit.

Questions with regard to particular facts tending to degrade the witness, and affect his character and credit, may be put to him on cross-examination, even though irrelevant to the matter in issue; but the party putting them must be satisfied with the answers given by the witness, and cannot call witnesses to prove those answers false.

Questions with regard to such particular facts may be put to a witness on cross-examination, and if relevant to the matter in issue, and denied by the witness, other witnesses may be called by the cross-examining party to contradict him.

Where the witness himself is not cross-examined to impeach his credit, but other witnesses are called for that purpose, they cannot be examined as to particular facts, but only as to the witness's general character for veracity.

The party calling a witness will not, on his giving evidence against him, be allowed to call witnesses to impeach his credit.

The cases decided upon these general rules will now be stated.

Credit impeached by irrelevant questions on cross-examination.] Although it is not allowable on cross-examination to put questions to a witness, not relating to the matter in issue, for the purpose, if he answers them against the cross-examining party, of contradicting him by other witnesses, yet it is a well established rule, that questions not relevant may be put to a witness for the purpose of trying his credibility; but in such case the party cross-examining must be satisfied with his answer. Thus, where on a trial for sheep-

stealing, the principal witness being the prisoner's apprentice, Lawrence J. permitted him on cross-examination to be asked, whether he had not been charged with robbing his master, and whether he had not said he would be revenged of him, and would soon fix him in gaol. The witness answering both questions in the negative, the prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him; but Lawrence J. said, that his answer must be taken as to the former, but that as the *words* were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness. *Yewin's case*, 2 *Campb.* 638. (*n.*) A witness was asked, whether he had not attempted to persuade a person called by the other side from attending to give his evidence, which he denied. It was proposed to call a witness to contradict him, but Lawrence J. said, "Had this been a matter in issue, I would have allowed you to call witnesses to contradict, but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness, as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call witnesses to contradict the answers. No witness can be prepared to support his character as to particular facts, and such inquiries would lead to endless confusion." *Harris v. Tippett*, 2 *Campb.* 637.

Credit impeached—by relevant questions—and contradiction by other witnesses.] Where a question tending to impeach the credit of the witness is not irrelevant to the issue, he may not only be compelled to answer it, but the other side may call witnesses for the express purpose of contradicting him, *vide ante*, *p.* 133. So what has been said or written by a witness at a previous time, may be given in evidence to contradict what he has said at the trial, if it relate to the matter in issue. *De Sailly v. Mergan*, 2 *Esp.* 691. Thus, in a policy case, the captain's protest has been admitted in evidence to contradict what he has stated at the trial. *Christian v. Coombe*, 2 *Esp.* 489.

But in order to let in this evidence in contradiction, a ground must be laid for it, in the cross-examination of the witness who is to be contradicted. When a witness has been examined as to particular transactions, if the other side were permitted to give in evidence declarations made by him respecting those transactions at variance with his testimony, without first calling the attention of the witness to those declarations, and refreshing his memory with regard to them, it would, as it has been observed, have an unfair effect upon his credit. Accordingly, it is the practice of the courts to ask a witness, whether he has held such a conversation, or made such a declaration, and such

previous question is considered a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side, and if the party has neglected to lay this foundation, the court will in its discretion recall the witness for that purpose. *The Queen's case*, 2 *Br. & Bingh.* 301.

The rule is thus laid down by Tindal C. J. "I understand the rule to be, that before you can contradict a witness by showing that he has, at some other time, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen, that upon the general question he may not remember having so said, whereas when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said." *Angus v. Smith*, *Moo. & Mal.* 474. Where the witness merely says, that he does not recollect making the statements, evidence to prove that he did in fact make the statements is inadmissible; there must be an express denial. *Pain v. Beeston*, 1 *Moo. & Rob.* 20.

With regard to contradicting a witness by the production of a letter or other document written by himself at a previous time, the rule is thus laid down in *The Queen's case*, 2 *Br. & Bingh.* 287. Upon cross-examination, counsel cannot be allowed to represent, in the statement of a question, the contents of a letter, and to ask a witness whether he wrote a letter to any person with such contents, or contents to the like effect, unless the letter is first shown to the witness, and he is asked whether he ever wrote such a letter, and he admits that he did write it. But a witness may be asked on cross-examination, upon showing him only a part, or one or more lines of such a letter, whether he wrote such part, or such one or more lines; but if he should not admit that he wrote such part or such lines he cannot be examined to the effect of the contents of the letter, unless it be shown to him, and he admits the contents. In the regular course of proceeding, the letter ought to be read after the cross-examining counsel has opened his case, but if it is stated to be necessary for the purpose of propounding further questions in the course of the cross-examination, the court will permit the letter to be read at once, subject to all the consequences of having such letter considered as part of his evidence. *The Queen's case*, 2 *Br. & Bingh.* 290.

With regard to the examination of a witness, who, upon cross-examination, has been examined touching declarations formerly made by him, respecting the matters upon which he has given evidence, it cannot be carried further than those declarations so inquired into, and the whole of the conversation which took place cannot be entered into. The rule is thus laid down by Abbott, C. J. in *The Queen's case*, 2 *Br. & Bingh.*

298. "The conversation of a *third person* with the witness is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all that had constituted the motive and inducement, and all that may show the meaning of the words and declarations, has been laid before the court, the court becomes possessed of all that can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent."

Proof of former declarations in support of credit of witness.] Whether it is competent to the party whose witness has been attached, on cross-examination, to give in evidence former declarations of the witness, to the same effect as his testimony, for the purpose of corroborating the latter, has been much controverted. In several cases such evidence was admitted upon the examination of the witness in chief. *Lutterell v. Reynell*, 1 *Mod.* 282. *Sir John Friend's case*, 13 *How. St. Tr.* 32. *See also Harrison's case*, 12 *How. St. Tr.* 861. So it is laid down by Gilbert, C. B. that though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony, to show that he affirmed the same thing on other occasions, and that he is still consistent with himself; for such evidence is only in support of the witness who gives in his testimony upon oath. *Gilb. Ev.* 150. 4*th ed.* And Hawkins states the rule to be, that what a witness has been heard to say at another time, may be given in evidence in order either to *confirm* or invalidate the testimony which he gives in court. *Hawk. P. C. b.* 2. *c.* 46, *s.* 48. These writers were followed by Mr. Justice Buller, in his treatise on the law of nisi prius, citing the case of *Lutterell v. Reynell*, *B. N. P.* 294.; but he appears afterwards to have changed his opinion.

The first case in which this evidence appears to have been rejected is *Parker's case*, 3 *Dougl.* 242, which was a prosecution for perjury, tried before Eyre, B. For the prosecution, the depositions of a deceased person were given in evidence, and upon the cross-examination of one of the prosecutor's witnesses, certain declarations of the deceased person, not on oath, were proved for the purpose of corroborating some facts in the deposition material to the prisoner; Eyre, B. rejected the evidence of those declarations, and the Court of King's Bench, on a motion for a new trial, held the rejection proper. Buller, J. said that the evidence was clearly inadmissible, not being upon oath; that it was now settled, that what a witness said, not upon oath, could not be admitted to confirm what he said upon oath, and that the case of *Lutterell v. Reynell*, and the passage cited from *Hawkins* were not now law. *Parker's case*,

3 *Dougl.* 244. This case was referred to by Lord Redesdale in the *Berkeley Peerage case*, where his lordship gave his opinion in conformity with that decision. Lord Eldon also expressed his decided opinion that this was the true rule to be observed by the counsel in the cause, but thought that the question might be asked by the house. 1 *Phill. Ev.* 292, (*n.*) In conformity with these later decisions, the rule is laid down by Mr. Phillipps with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 1 *Phill. Ev.* 293. So it is said by Sir W. D. Evans, "If a witness speaks to facts negativing the existence of a contract, and insinuations are thrown out that he has a near connexion with the party, on whose behalf he appears, that a change of market, or any other alteration of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony, that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have had, if the motives for receding from a previous intention never had existed. Upon accusations for rape, where the forbearing to mention the circumstance for a considerable time, is itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection." *Notes to Pothier on Oblig. vol.* ii. *p.* 251.

PRIVILEGED COMMUNICATIONS.

General rule - - - - 144
What persons are privileged - - - 144
Form of Oath by Witnesses claiming the privilege - 146
What matters are privileged - - - 146
Production of deeds - - - - 147
Disclosures by informers, &c. - - - 147
To whom - - - - 147
Matters of State - - - - 149
Matters before Grand Jury - - - 150
Matters of fact - - - - 150
Matters to which attorney is party - - 152
Where party has taken oath of office not to divulge - 153

General rule.] Although a witness is sworn to speak the truth, the *whole* truth, and nothing but the truth, yet there are certain matters which he is not only not bound to disclose, but which it is his duty, even under the obligation of an oath, not to disclose. Where a communication takes place between a counsel or an attorney, and his client, or between government and some of its agents, such communication is privileged, on the ground that should it be suffered to be disclosed the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy. But the rule does not extend beyond the two classes of persons above mentioned, whatever obligation of concealment the party may have incurred.

What persons are privileged.] Except in the case of matters of state, the privilege of not disclosing confidential communications is confined to counsel, solicitors, attornies, and their agents and clerks. *Wilson v. Rastall*, 4 *T. R.* 758, 759. *Duchess of Kingston's case*, 11 *St. Tr.* 243. *fo. ed.*, 20 *How. St. Tr.* 575. Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege. *Ibid.* Thus, where the prisoner, being a Roman Catholic, made a confession, before a Protestant clergyman, of the crime for which he was indicted, that confession was permitted to be given in evidence at the trial, and he was convicted and executed. *Sparkes's case, cited Peake, N. P. C.* 78. Upon this case being cited, Lord Kenyon observed that he should have paused before he admitted the evidence; but there appears to be no ground for

this doubt. In *Gilham's case, Ry. & M. C. C. R.* 198., it was admitted by the counsel for the prisoner that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and the prisoner in that case was convicted and executed.

A person who acts as interpreter between a client and his attorney will not be permitted to divulge what passed; for what passed through the medium of an interpreter is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversations between the interpreter and the client in the absence of the attorney. *Du Barré v. Livette, Peake, N. P. C.* 77, 4 *T. R.* 756. 20 *How. St. Tr.* 575 (*n.*), So the agent of the attorney stands in the same situation as the attorney himself. *Parkins v. Hawkshaw,* 2 *Stark. N. P. C.* 239. So a clerk to the attorney. *Taylor v. Forster,* 2 *C. & P.* 195. *R. v. Inhabitants of Upper Boddington,* 8 *D. & R.* 732. So a barrister's clerk. *Foote v. Hayne, Ry. & Moo.* 165.

Where a person, not being an attorney, is consulted by another, under a false impression that he is such, he will not be privileged from disclosing what passes. *Fountain v. Young,* 6 *Esp.* 113.

The privilege is that of the client, and not of the attorney, and the courts will prevent the latter, although willing, from making the disclosure. *Bull. N. P.* 284. *Wilson v. Rastall,* 4 *T. R.* 759. *See the arguments in Annesley's case,* 17 *How. St. Tr.* 1224, 1225. But if the attorney of one of the parties is called by his client and examined as to a matter of confidential communication, he may be cross-examined as to that matter, though not as to others. *Vaillant v. Dodemead,* 2 *Atk.* 524.

An attorney is not privileged from disclosing matters communicated to him before his retainer, or after it has ceased, for then he stands clearly in the same situation as any other person. *Bull. N. P.* 284. Where an attorney was employed to put in suit a note, and after the suit was settled the client told him that he knew it was a lottery transaction, the attorney, in an action to recover the money, was allowed to give evidence of this conversation. The court said that the purpose in view (in employing the attorney) had been already obtained, and what was said by the client was in exultation to his attorney, on having before deceived him, as well as his adversary. *Cobden v. Kendrick,* 4 *T. R.* 431. "This communication," observes Lord Brougham, in commenting on the case, "was not made professionally, but by way of idle and useless conversation; had the matter been confided with a view to some future proceedings, or, without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected." *Greenough v. Gaskell,* 1 *Mylne & K.* 109.

Form of oath by witnesses claiming to be privileged.] In general a witness who is privileged from disclosing facts which have come to him in his professional capacity, is sworn in the usual manner, to speak the truth, the *whole truth*, and nothing but the truth; but where a person who had been counsel for one of the parties, declined to take the usual oath, the court permitted him to take an oath to declare such things as he knew before he was counsel, or as had come to his knowledge since, by any other person; and the particulars to which he was to be sworn were specially stated. *Spark v. Sir H. Middleton*, 1 *Keb.* 505; 12 *Vin. Ab.* 38. It has been observed that a precaution like this seems to arise out of an excessive tenderness of conscience; for that the general obligation of an oath, to declare the whole truth, must, with reference to the subject matter and occasion of the oath, be necessarily understood to mean the truth so far as it ought legally to be made known. 2 *Stark. Ev.* 232, *citing Paley's Moral Philosophy.*

What matters are privileged.] Although some doubt has been entertained, as to the extent to which matters communicated to a barrister or an attorney in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted by Lord Tenterden to the latter cases only; *see Clark v. Clark*, 1 *Moody & Rob.* 4, *Williams v. Mundie*, *Ry. & Moo.* 34; yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. *See all the cases commented upon by the L. C. in Greenough v. Gaskell*, 1 *Myl. & K.* 100. *See also Walker v. Wildman*, 6 *Madd.* 47. *Mynn v. Joliffe*, 1 *Moo. & Ry.* 326.

With regard to the nature of the communications touching the matters which are privileged, the following description of them by Mr. Alison, in his *Practice of the Criminal Law of Scotland*, p. 469, appears to be comprehensive and correct, and to correspond entirely with the rule of the English law. "Facts which have come to the witness's knowledge professionally, in relation to the matter charged, fall within the protection, though not obtained from the prisoner himself, as for example, directions made by his relations or friends previous to the trial; memorials laid before counsel; notes furnished to agents or the like, if done with that view. Under that head must be included facts, gathered by the agent himself, in precognoscing the witnesses, or by his clerk in copying or reading that precognition, or attending the examination of the witnesses under it. Farther the privilege extends, under a limitation to be immediately noticed, to all professional communications in relation to the matter libelled, though long anterior to the date of the crime, if in regard to matters which

are now charged as forming part of, or adduced in evidence regarding it."

An attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. *Wither's case*, 2 *Campb.* 578.

What matters are privileged—production of deeds, &c.] A communication in writing is privileged, as well as a communication by parol; and deeds and other writings deposited with an attorney in his professional capacity, will not be allowed to be produced by him. To prove the contents of a deed, the defendant's counsel offered a copy, which had been procured from the attorney of a party under whom the plaintiff claimed, but Bayley J. refused to admit it. He said, "the attorney could not have given evidence of the contents of the deed which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last." *Fisher v. Hemming*, 1809. 1 *Phill. Ev.* 132.

What matters are privileged—disclosures by informers, &c.] Another class of privileged communications, are those disclosures which are made by informers, or persons employed for the purpose, to the government, the magistracy, or the police, for the purpose of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre C. J. "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in the present case." *Hardy's case*, 24 *How. St. Tr.* 808.

What matters are privileged—disclosures by informers, &c.—to whom.] It is not of course every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged,

and a communication to a member of government, is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. *Watson's case*, 2 *Stark. N. P. C.* 136. So a person employed by an officer of the executive government, to collect information at a meeting, supposed to be held for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connection between them. *Hardy's case*, 24 *How. St. Tr.* 753. *Watson's case, Gurney's Rep.* 159, 32 *How. St. Tr.* 100.

The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice. A witness, who had given information, admitted on a trial for high treason, that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering in the negative, he was asked who was the friend? It was objected, that the person by whose advice the information was given to one standing in the situation of magistrate, was in fact the informer, and that his name could not be disclosed. The judges differed. *Eyre C. J.*, *Hotham B.* and *Grose J.* thought the question objectionable, *Macdonald C. B.* and *Buller J.* were of opinion it should be admitted. *Eyre C. J.* said, "Those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. It is no more competent to ask who the person was that advised the witness to make a disclosure, than it is to ask to whom he made the disclosure in consequence of that advice; or than it is to ask any other question respecting the channel of information, or what was done under it." *Hotham B.* said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald C. B. said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; and the opinion of Buller J. was founded on the same reason. *Hardy's case*, 24 *How. St. Tr.* 811.

Upon the same principle it has been held, that communications between the governor and law officers of a colony, *Wyatt v. Gore, Holt, N. P. C.* 299, between the governor of a colony and one of the secretaries of state, *Anderson v. Hamilton*, 2 *B. & Bingh.* 156, between a governor of a colony and a military officer, *Cooke v. Maxwell*, 2 *Stark.* 183, are privileged. In the

latter case the communication was in writing, and Bayley J. said, "if the document cannot on principles of public policy be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but that what was done, was done by the orders of the defendant."

But where the information has been given, not to the government, or to any person connected with the administration of justice, nor to any other, for the purpose of being conveyed to such person, a disclosure of the circumstances attending it may be required. *See the opinion of Macdonald C. B., and Buller J. in Hardy's case, ante, p.* 148.

What matters are privileged—matters of state.] Matters communicated confidentially, in furtherance of the administration of justice, are, as it has been stated, privileged from disclosure, and upon the same grounds matters of state, as official communications between different members or officers of government receive a like protection. Some cases of this kind have been already mentioned, *ante, p.* 148. So where, on a trial for high treason, Lord Grenville was called upon to produce a letter, intercepted at the post-office, and which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his majesty's confidential subjects. *Case cited by Lord Ellenborough, Anderson v. Hamilton,* 2 *Br. & Bingh.* 157, (*n.*) What passes in parliament, is in the same manner privileged. Thus, on a trial for a libel upon Mr. Plunkett, a member of the Irish parliament, the speaker of the Irish house of commons being called and asked, whether he had heard Mr. Plunkett deliver his sentiments in parliament on matters of a public nature, Lord Ellenborough said that the speaker was warranted in refusing to disclose what had taken place in a debate in the house of commons. He *might* disclose what passed there, and if he thought fit to do so, he should receive it as evidence. As to the fact of Mr. Plunkett having spoken in parliament, or taken any part in the debate, he was bound to answer. That was *a fact* containing no improper disclosure of any matter. *Plunkett v. Cobbett,* 5 *Esp.* 136, 29 *How. St. Tr.* 71, 72, *S. C.* On the same ground, viz. that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of the prisoner, was accurate. *Watson's case,* 2 *Stark. N. P. C.* 148.

The two following cases, however, are at variance with the rule above stated. Upon the trial of Lord Strafford, the confidential advice given by that nobleman to the king, at the council table, was allowed to be disclosed, and given in evidence against him. *Strafford's case,* 1 *St. Tr.* 723, *fo. ed.*

And in the case of *the Seven Bishops*, 4 *St. Tr.* 346. *fo. ed.* the clerk of the privy council was compelled to state what passed at the council-board, and even what the king himself said, although the counsel for the crown objected to it. However, in *Sayers case*, 6 *St. Tr.* 288, *fo. ed.* it seems to have been considered, that minutes taken before the privy council were not to be divulged, and it cannot be doubted that at the present day the practice adopted in the case of Lord Strafford and of the Seven Bishops would be overruled, as contrary to the principles of the law of evidence, and injurious to the public interests.

What matters are privileged—matters before grand jury.] Matters which take place before a grand jury are privileged from disclosure; and a clerk attending before them shall not be compelled to reveal what was given in evidence. *Trials per pais*, 220. 12 *Vin. Ab.* 38. *Evidence*, (*B. a.* 5.) Though the grand jury are bound, upon oath, not to disclose the matters which pass before them, yet a grand juryman may be called to prove who was the prosecutor of an indictment, for it is a question of fact, the disclosure of which does not infringe upon his oath. *Sykes v. Dunbar*, 2 *Selw. N. P.* 1004.

What communications are not privileged—matters of fact.] Where the subject inquired into is a mere matter of *fact*, which the party setting up the privilege might have obtained a knowledge of in his individual capacity, as properly as in his character of professional adviser, he will be compelled to disclose it. Thus, an attorney, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a razure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge, but he ought not to be permitted to discover any confession which his client may have made to him on that head. *B. N. P.* 284. So the clerk of an attorney may be called to identify a party, though he has only become acquainted with him in his professional capacity, for it is a fact cognizable both by the witness and by others, without any confidence being reposed in him; *Studdy v. Sanders*, 2 *Dow. & Ry.* 347; though the contrary was, upon one occasion, ruled by Mr. Justice Holroyd. *Parkins v. Hawkshaw*, 2 *Stark. N. P. C.* 240. So an attorney's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. *Eicke v. Nokes*, *Moo. & M.* 304. So an attorney conducting a cause, may be called and asked who employed him, in order to let in the declarations of that person as the real party. *Levy v. Pope*, *Moo. & M.* 410. So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action. *Hurd v. Moring*, 1 *C. & P.*

372. *Robson v. Kemp*, 5 *Esp.* 52. So where an attorney is present when his client is sworn to an answer in Chancery, on an indictment for perjury, he will, it is said, be a good witness to prove the fact of the taking of the oath, for it is not a matter of secrecy committed to him by his client. *Bull. N. P.* 284. But in the case of *R. v. Watkinson*, 2 *Str.* 1122, where the solicitor on a similar indictment was called to speak to the identity of the defendant's person, the Chief Justice would not compel him to be sworn. "*Quære tamen?*" says the reporter, "for it was a fact within his own knowledge." And Lord Brougham, in commenting upon this case, in *Greenough v. Gaskell*, 1 *Myl. & K.* 108, observes, that the putting in the answer, so far from being a secret, was in its very nature a matter of publicity, and that the case cannot be considered as law at the present day.

Where a communication is made to an attorney, not for the purpose of obtaining his legal opinion and advice, but in order to procure information upon a point, which might be as well obtained from an unprofessional person, the rule as to privilege does not apply. Thus where a trader asked his attorney whether he could safely attend a meeting of his creditors, and the attorney advised him to remain at his office, it was held that this communication was not privileged, for that it was made by the attorney upon a matter of fact, in the character merely of agent or friend. *Bramwell v. Lucas*, 2 *B. & C.* 745. The exception in question is well illustrated in the following case: In ejectment by *Mr. Annesley* against the *Earl of Anglesea*, one *Giffard*, who had been twenty years professionally employed by the Earl of Anglesea, was called to prove a conversation which he had had with that nobleman, respecting a prosecution against Mr. Annesley for murder, from which it would appear that the Earl privately took an active part in the prosecution, in order that Mr. A. might be hanged, and himself freed from his claims to the estate. The court admitted the evidence; and Bowes, C. B., after stating the general rule, said, "Does it follow from thence that every thing said by a client to his attorney falls under the same reason? I own I think not; because there is not the same necessity upon the client to trust him in one case as in the other, and of this the court may judge, from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be interested in one case as an attorney and agent, and in another as a common acquaintance. In the first case the court will not permit him, though willing, to disclose what came to his knowledge, as an attorney, because it would be a breach of that trust, which the law supposes to be necessary between him and his employer; but where the client talks to him at large, as a friend, and not in the way of his profession, the court is not under the same obligation to guard such secrets, though in the

breast of an attorney." *Annesley v. Earl of Anglesea, Trial at the bar of the Court of Exchequer in Ireland,* 17 *How. St. Tr.* 1217, 1239; *M'Nally Ev.* 241.

So where, in *the Duchess of Kingston's case,* 20 *How. St. Tr.* 613, the attorney of Lord Bristol was called, and asked what passed between himself and a witness, whom he had called on, to procure him to attend and prove the marriage; upon his demurring to the question, Lord Mansfield said this was no secret of his client, but a collateral fact, viz. what the witness had told him on the application, and he was directed to answer the question. See also *Plunkett v. Cobbett,* 5 *Esp.* 136, *ante, p.* 149, *and Sykes v. Dunbar,* 2 *Selw. N. P.* 1004, *ante, p.* 150.

What matters are not privileged—attorney party to transaction.] Another exception to the rule of privileged communications is, where the attorney is so far himself a party to the transaction, that the communications may be supposed to be made to him in that character, and not in the character of professional adviser. Thus where, on a question whether there had been usury in giving a bond, the defendant called the plaintiff's attorney to prove that the consideration of the bond was usurious; on this being objected to, Lord Kenyon said, that the privilege did not extend to this case, for that where the attorney is as it were a party to the original transaction, *that* does not come to his knowledge in the character of attorney, and that he is liable to be examined the same as any other person. *Duffin v. Smith, Peake, N. P. C.* 108. So it seems that every one, whether counsel, attorney, or other person, is bound to divulge matters communicated with a view to the *perpetration* of a crime. It has, therefore, been held in Scotland, that an agent who would otherwise be privileged, may be compelled to swear to his client's having declared his purpose to commit the crime to him; or that he undertook a criminal employment by his desire, as in the case of forgery, by falsifying a deed, the copy of which was sent to him by his employer. *Alison, Prac. Cr. L. S.* 473. The facts of the following case appear almost to bring it within the above rule, but the decision was the other way. In a prosecution for the forgery of a promissory note, the attorney who had the note in his possession refused to produce it. He stated that he had been consulted by the prisoner on the note in question, and that by his directions he had commenced an action against the person in whose name it was forged. The attorney was not employed for the prosecution, and a demand of the note had been made upon him by the prisoner's attorney. Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it to the clerk of arraigns, and a true bill having been found, he likewise held that the attorney was not bound to produce

it at the trial. *Smith's case, Derby Sum. Ass.* 1822, 1 *Phill. Ev.* 132.

What matters are privileged—where oath of office has been taken not to divulge.] Where, for revenue or other purposes, an oath of office has been taken not to divulge matters which have come to the knowledge of a party in his official capacity, he will not be allowed, where the interests of justice are concerned, to withhold his testimony. Thus where the clerk to the commissioners of the property tax being called to produce the books containing the appointment of a party as collector, objected on the ground that he had been sworn not to disclose any thing he should learn in his capacity of clerk, Lord Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpœna*. He added that the witness must produce the books, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. *Lee q. t. v. Birrell*, 3 *Campb.* 337.

DOCUMENTARY EVIDENCE.

Proof of Acts of Parliament . . . 153
Records . . . 154
Office Copies and Copies by authorised Officers, &c. 155
Inquisitions . . . 156
Verdicts . . . 156
Affidavits made in Causes . . . 157
Proceedings in Equity . . . 158
Depositions . . . 158
Judgments and proceedings of inferior Courts . 159
Probate and Letters of Administration . . 159
Public Books and Documents . . 159
Ancient Documents, Terriers, &c. . . 160
Private Documents . . . 161
Attesting Witness . . . 161
When waived . . . 161
Handwriting . . . 162
Stamps 164

Proof of acts of parliament, &c.] The courts will take notice of public acts of parliament without their being specially proved, but private acts of parliament must be proved by a

copy examined with the parliament roll, *B. N. P.* 225, unless the mode of proof be provided for by the act. Where there is a clause in the act, declaring that it shall be taken to be a public act, and shall be taken notice of as such by all judges, &c. without being specially pleaded, it is not necessary to prove a copy examined with the roll, or a copy printed by the king's printer, but it stands upon the same footing as a public act. *Beaumont v. Mountain*, 10 *Bingh.* 404. For other purposes, however, as with regard to the recital of facts contained in it, this clause does not give the statute the effect of a public act. *Brett v. Beales, Moo. & M.* 421. By statute 41 G. 3. c. 90. s. 9. the statutes of England and (since the union with Scotland) of Great Britain, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland, and in like manner the copy of the statutes of the kingdom of Ireland, made in the parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland, prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain. The journals of the lords and commons must be proved by examined copies. *Lord Melville's case*, 24 *How. St. Tr.* 683. *Lord G. Gordon's case*, 2 *Dougl.* 593.

Proof of records.] Where there is a plea of *nul tiel record*, the record is proved by its production, if it be a record of the same court, *Tidd, Pr.* 801; if of an inferior court by the tenor of the record, certified under a writ of *certiorari*, issued by the superior court; if of a concurrent superior court, by the tenor certified under a writ of *certiorari* issued out of chancery, and transmitted thence by *mittimus. Id.*

Where *nul tiel record* is not pleaded, a judgment is proved either by an exemplification under the seal of the court, or by an examined copy. Such exemplifications under the seal of a public court in this country, are evidence without proof of the genuineness of the seal. *Tooker v. Duke of Beaufort, Sayer*, 297. But the genuineness of the seal of a foreign court must be proved. *Henry v. Adey*, 3 *East*, 221.

A record is not complete until delivered into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither records nor in the nature of records. *Bellamy's case, Ry. & Moo.* 172. And where, to prove an indictment for felony found by the grand jury, the indictment itself, (which was in another court) indorsed "a true bill," was produced by the clerk of the peace, together with the minute book of the proceedings of the sessions, at which the indictment was found, the Court of King's Bench held that in order to prove the indictment, it was necessary to

have the record regularly drawn up, and that it should be proved by an examined copy. *Smith's case*, 8 *B. & C.* 341. *Cooke v. Maxwell*, 2 *Stark.* 183. So an allegation that the grand jury at sessions found a true bill, is not proved by the production of the bill itself with an indorsement upon it, but a record regularly made up must be produced. *Porter v. Cooper*, 6 *C. & P.* 354. So it has been ruled, on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made up on parchment. *Ward's case*, 6 *C. & P.* 366. A plea of *autre fois convict*, in like manner, must be proved by the record regularly made up, and the indictment with the finding of the jury, indorsed upon it by the proper officer is not sufficient. *Bowman's case*, 6 *C. & P.* 101. But in *Tooke's case*, 25 *How. St. Tr.* 446, the minutes of the court were received to prove the acquittal of Hardy. This case is distinguished by Lord Tenterden from the foregoing, on the ground that the matter proved by the minutes occurred before the *same court*, sitting under the same commission. 8 *B. & C.* 343. So a judgment on paper signed by the master is not evidence, for it has not yet become permanent. *B. N. P.* 228. *Godefroy v. Jay*, 1 *M. & P.* 236, 3 *C. & P.* 192, *S. C.* In one case the minutes of the Lord Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction. *Fisher v. Lane*, 2 *W. Bl.* 834. 8 *B. & C.* 342.

The mode of examination usually adopted, is for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. *Rees v. Margison*, 1 *Campb.* 469. *Gyles v. Hill*, *Id.* 471. (*n.*) It must appear that the original came from the proper place of deposit, or out of the hands of the officer, in whose custody the records are kept. *Adamthwaite v. Synge*, 1 *Stark.* 183, 4 *Campb.* 572. *S. C.*

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.* 1 *Ventr.* 256. *B. N. P.* 228.

Proof by office copies, and copies by authorised officers, &c.] An office copy is not evidence of the original, if the latter be in another court. Thus office copies of depositions in chancery are evidence in chancery, but not at common law, without examination with the roll. *B. N. P.* 229. 5 *M. & S.* 38. In a court of common law, an office copy has been held sufficient in the same court and in the same cause. *Denn v. Fulford*, 2 *Burr.* 1179. And so it seems that an issue out of chancery may be considered as a proceeding in that court, and an office copy would probably be held evidence there. *See Highfield v.*

Peake, Moo. & Mal. 111. There appears to be no reason for distinguishing between the effect of office copies in different causes in the same court, the principle of the admissibility being, that the court will give credit to the acts of its own officers, and accordingly, it was held in one case, that an office copy made in another cause in the same court was admissible. *Wightwick v. Banks, Forrest*, 154.

Where there is a known officer, whose duty it is to deliver out copies which form part of the title of the parties receiving them, and whose duty is not performed till the copy is delivered, as in the case of the chirograph of a fine, and the inrolment of a deed, such copies are evidence, without proof of examination with the originals. *See Appleton v. Lord Braybrooke*, 6 *M. & S.* 37. The certificate of the inrolment of a deed pursuant to the statute is a record, and cannot be averred against. *Hopper's case*, 3 *Price*, 495. A copy of a judgment purporting to be examined by the clerk of the treasury, (who is not intrusted to make copies) is not admissible without proof of examination with the original. *B. N. P.* 229.

Office copies of rules of court, being made out by officers of the court in the execution of their duty, are sufficient evidence without being proved to have been examined. *Selby v. Harris*, 1 *Ld. Raym.* 745. *Duncan v. Scott*, 1 *Campb.* 102. And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. *Dance v. Robson, Moo. & M.* 294.

Proof of Inquisitions.] Inquisitions *post mortem*, and other private offices cannot be read in evidence, without proof of the commission upon which they are founded; but in cases of more general concern, as the ministers' return to the commission in Henry the Eighth's time, to inquire into the value of livings, the commission is a thing of such public notoriety that it requires no proof. *Per Hardw. C. in Sir H. Smithson's case, B. N. P.* 228. An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 Ed. 1. will be presumed to have been taken under a competent authority, though the commission cannot be found. *Rowe v. Brenton*, 8 *B. & C.* 747.

Proof of verdict.] The mode of proving a verdict depends upon the purpose for which it is produced. Where it is offered in evidence, merely to prove that such a cause came on for trial, the *postea* with the verdict indorsed is sufficient. *Pitton v. Walter*, 1 *Str.* 162. So it is sufficient to introduce an account of what a witness, who is since dead, swore at the trial. *Per Pratt, C. J. Id.* So upon an indictment for perjury, committed by a witness in a cause, the *postea*, with a minute by the officer,

of the verdict having been given, is sufficient to prove that the cause came on for trial. *Browne's case, Moo. & M.* 314. But without such minute, the nisi prius record is no evidence of the case having come on for trial. *Per Lord Tenterden, Id.* In London and Westminster, it is not the practice for the officer to indorse the *postea* itself as in the country, but the minute is indorsed on the jury pannel, *Id.*

But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered upon the record, and that judgment thereupon has also been entered on record, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. *Fisher v. Kitchenham, Willes,* 368. *Pitton v. Walter,* 1 *Str.* 162. *B. N. P.* 243. In one case, indeed, Abbott, J. admitted the *postea* as evidence of the amount recovered by the verdict; *Foster v. Compton,* 2 *Stark.* 364; and Lord Kenyon also ruled that it was sufficient proof to support a plea of set off, to the extent of the verdict; *Garland v. Schoones,* 2 *Esp.* 648; but these decisions appear to be questionable.

Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because, possibly it might not be returned, and then it is no record; but where the writ itself is the gist of the action, a copy of the writ on record must be proved in the same manner as any other record. *B. N. P.* 234.

Proof of affidavits made in causes.] In what manner an affidavit filed in the course of a cause is to be proved, does not appear to be well settled. In an action for a malicious prosecution, an examined copy has been admitted. *Crook v. Dowling,* 3 *Dougl.* 72, *but see Rees v. Bowen, M'Cl. & Y.* 383. A distinction has been taken between cases where the copy is required to be proved in a civil suit, and where it forms the foundation of a criminal proceeding, as upon an indictment for perjury. In *James's case,* 1 *Show.* 327, *Carth.* 220, *S. C.*, the defendant was convicted of perjury upon proof of a copy of an affidavit; it was urged that it was only a copy, and that there was no proof that it had been made by the defendant; but it appearing that it had been made use of by the defendant in the course of the cause, the court held it sufficient. This case was however doubted in *Crook v. Dowling,* 3 *Dougl.* 77, where Lord Mansfield said that on indictments for perjury, he thought the original should be produced. Buller, J. also observed that wherever identity is in question, the original must be produced. *Id.* 77. The same rule is laid down with regard to the proof of answers in chancery upon indictments for perjury. *Vide post, p.* 158. It may be doubted how far the distinction in question has any foundation in principle, the rules of evidence

with regard to the proof of documents being the same in civil and in criminal cases; and the *consequences* of the evidence not being a correct test of the *nature* of the evidence.

Proof of proceedings in equity.] A bill or answer in chancery, when produced in evidence for the purpose of showing that such proceedings have taken place, or for the purpose of proving the admissions made by the defendant in his answer, may be proved either by production of the original bill or answer, or by an examined copy, with evidence of the identity of the parties. *Hennell v. Lyon*, 1 *B. & A.* 182. *Ewer v. Ambrose*, 4 *B. & C.* 25. But a distinction is taken where the answer is offered in evidence in a criminal proceeding, as upon an indictment for perjury, in which case it has been said to be necessary, that the answer itself should be produced, and positive proof given by a witness acquainted with him, that the defendant was sworn to it. *Chambers v. Robinson*, *B. N. P.* 239. *Lady Dartmouth v. Roberts*, 16 *East*, 340. In order to prove that the answer was sworn by the defendant, it is sufficient to prove his signature to it, and that of the master in chancery, before whom it purports to be sworn. *Benson's case*, 2 *Campb.* 508. *Morris's case*, *B. N. P.* 239, 2 *Burr.* 1189, *S. C.*

A decree in chancery may be proved by an exemplification, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer, or without such proof, if the bill and answer be recited in the decretal order. *B. N. P.* 244. *Com. Dig. Testm.* (*C.* 1.) With regard to the proof of the previous proceedings, the correct rule appears to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as that *a decree* was made by the court), he ought regularly to give in evidence the proceedings on which the decree is founded. 1 *Phill. Ev.* 373. *See Blower v. Hollis*, 1 *Crom. & M.* 393, 3 *Tyr.* 351, *S. C.*

Proof of depositions.] The depositions of witnesses, who are since dead, may, when admissible, be proved by the judge's notes, or by notes taken by any other person who can swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given. *Per Mansfield, C. J. Mayor of Doncaster v. Day*, 3 *Taunt.* 262. Where a witness called to give such evidence cannot prove the words, but only the effect of them, he is inadmissible. *Lord Palmerston's case, cited* 4 *T. R.* 290. *Ennis v. Donnisthorne*, 1 *Phill. Ev.* 219. 6*th ed.*

Where depositions in chancery are offered in evidence, merely for the purpose of proving a fact admitted in them, or of contradicting a witness, it is not necessary to give evidence of the bill and answer. 1 *Phill. Ev.* 375. 6*th ed.* But where it is necessary to show that they were made in the course of a

judicial proceeding, as upon an indictment for perjury in the deponent, proof of the bill and answer will be required. Where the suit is so ancient that no bill or answer can be found, the depositions may be read without proof of them. Depositions taken by the command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read. *Lord Hunsdon v. Lady Arundell, Hob.* 112, *B. N. P.* 240. So depositions taken in 1686, were allowed to be read without such proof; *Byam v. Booth*, 2 *Price*, 234; and answers to old interrogatories, (exhibited 1 Eliz.) have been read upon proof that the interrogatories were searched for and not found. *Rowe v. Brenton*, 8 *B. & C.* 765. But in general, depositions taken upon interrogatories under a commission, cannot be read without proof of the commission. *Bayley v. Wylie*, 6 *Esp.* 85.

Proof of judgments and proceedings of inferior courts.] The judgments and proceedings of inferior courts, not of record, may be proved by the minute book in which the proceedings are entered, as in the case of a judgment in the county court. *Chandler v. Roberts, Peake Ev.* 80. *5th ed.* So an examined copy of the minutes will be sufficient. *Per Holt, C. J. Comb.* 337. 12 *Vin. Ab. Evid. A. pl.* 26.

Proof of probate and letters of administration.] The probate of a will is proved by the production of the instrument itself; and proof of the seal of the court is not necessary. In order to prove the title of the executor to personal property, the probate must be given in evidence; it is not sufficient to produce the will itself. *Pinney v. Pinney*, 8 *B. & C.* 335. When the probate is lost it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthouse*, 1 *Str.* 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence. *Rambsbotham's case*, 1 *Leach*, 30. (*n.*) 3*d ed.*

Administration is proved by the production of the letters of administration granted by the Ecclesiastical Court. *Kempton v. Cross, Rep. Temp. Hardw.* 108. *B. N. P.* 246. So the original book of acts of that court directing the granting the letters is evidence. *B. N. P.* 246. And an examined copy of such act book is also evidence. *Davis v. Williams*, 13 *East*, 232.

Proof of public books and documents.] Wherever the contents of a public book or document are admissible in evidence, as such, examined copies are likewise evidence, as in the case of registers of marriages, deaths, &c. *Vide post.* Thus an examined copy of an order in council is sufficient, without

the production of the council books themselves. *Eyre v. Palsgrave*, 2 *Campb.* 605. So copies of the transfer books of the East India Company. *Anon.* 2 *Dougl.* 593. (*n.*) and of the Bank of England; *Marsh v. Colnett*, 1 *Esp.* 665; *Bretton v. Cope*, *Peake*, *N. P. C.* 30; of a bank note filed at the bank, *Mann v. Cary*, 3 *Salk.* 155; so the books of commissioners of land-tax, *King's case*, 2 *T. R.* 234; or of excise; *Fuller v. Fotch*, *Carth.* 346; or of a poll-book at elections. *Mead v. Robinson*, *Willes*, 424. In one case the copy of an agreement contained in one of the books in the Bodleian Library, (which cannot be removed) was allowed to be read in evidence. *Downes v. Moreman*, 2 *Gwill.* 659.

Corporation books may be given in evidence, as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence. *Mothersell's case*, 1 *Str.* 93. But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. *Id.* An examined copy of a corporate book is evidence. *Brocas v. Mayor of London*, 1 *Str.* 308. *Gwyn's case*, 1 *Str.* 401.

Public registers, as of births, marriages, or deaths, are proved either by the production of the register itself, or of an examined copy. *B. N. P.* 247. Parol evidence of the contents of a register has been admitted; yet the propriety of such evidence, says Buller, may well be doubted, because it is not the best evidence the nature of the case is capable of. *B. N. P.* 247. A copy of a record or of a public book is not, in fact, secondary evidence; and therefore the opinion of Mr. Justice Buller appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of persons who were present. Thus, upon an indictment for bigamy, it was held sufficient to prove the marriage, by the evidence of a person who was present at it, without proving the registration, licence, or banns. *Allison's case*, *Russ. & Ry. C. C.* 109.

In proving a register, some evidence of the identity of the parties must be given, as by proof of the handwriting, for which purpose it is not necessary to call the subscribing witnesses. *Per Lord Mansfield*, *Birt v. Barlow*, 1 *Dougl.* 174. The identity is usually established by calling the minister, clerk, or some other person who was present at the ceremony.

Proof of ancient documents, terriers, &c.] In many cases ancient documents are admitted in evidence, to establish facts which, had they been recently made, they would not have been allowed to prove. These documents prove themselves, provided it appear that they are produced out of the proper custody. The proper repository of ecclesiastical terriers

or maps is the registry of the bishop or archdeacon of the diocese. *Atkins v. Hatton*, 2 *Anstr.* 387. *Potts v. Durant*, 3 *Anstr.* 795. On an issue to try the boundaries of two parishes, an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any person bearing a public character or office in the parish. *Earl v. Lewis*, 4 *Esp.* 3.

So also with regard to private ancient documents, it must appear that they came from the custody of some person connected with the property. Thus, where upon an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence J., the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. *Swinnerton v. Marquis of Stafford*, 3 *Taunt.* 91. So a grant to the abbey of Glastonbury, contained in an ancient MS., deposited in the Bodleian Library, entitled *Secretum Abbatis*, was rejected, as not coming from the proper repository. *Mitchell v. Rabbets, cited, Id.*

Proof of private documents—attesting witness.] The execution of a private document, which has been attested by a witness subscribing it, must be proved by calling that witness, although the document may not be such as by law is required to have the attestation of a witness. Thus if a warrant of distress has been attested, the attesting witness must be produced. *Higgs v. Dixon*, 2 *Stark.* 180. And even where the defendant himself was proved to have admitted the execution, in an answer to a bill in chancery, this was held insufficient, without calling the attesting witness. *Call v. Dunning*, 4 *East*, 53. *See also Abbott v. Plumbe*, 1 *Dougl.* 217.

Proof of private documents—attesting witness—when proof waived.] Where the attesting witness is dead ; *Anon.* 12 *Mod.* 607. ; or blind ; *Wood v. Drury*, 1 *Lord Raym.* 734 ; *Pedley v. Paige*, 1 *Moo. & Rob.* 258 ; or insane ; *Currie v. Child*, 3 *Campb.* 283 ; or infamous ; *Jones v. Mason*, 2 *Str.* 833 ; or absent in a foreign country, or not amenable to the process of the superior courts ; *Prince v. Blackburn*, 2 *East*, 252 ; as in Ireland ; *Hodnett v. Foreman*, 1 *Stark.* 90 ; or where he cannot be found, after diligent inquiry ; *Cunliffe v. Sefton*, 2 *East*, 183 ; in all these cases evidence of the attesting witness's handwriting is admissible. *As to the nature of the inquiry, see Rose. Dig. Ev. N. P.* 67. 3*d ed.* Some evidence must be given in these cases of the identity of the executing party : and although there are cases to the contrary, it is now held that mere identity of name is not sufficient proof of the identity of the party. *Whitelocke v. Musgrave*, 1 *Crom. & Mee.* 511, 3 *Tyr.* 541. *S. C.*

The illness of the attesting witness, although he lies without hope of recovery, is not a sufficient ground for letting in evidence of his handwriting. *Harrison v. Blades*, 3 *Campb.* 457.

Where a witness is interested *at the time of his attesting an instrument*, it is the same as if it were unattested, and the execution must be proved by evidence of the handwriting of the party executing. *Swire v. Bell*, 5 *T. R.* 371. But a party who, with a knowledge of the interest, has requested the witness to attest, cannot afterwards object to him on the ground of interest. *Honeywood v. Peacock*, 3 *Campb.* 196. Where a witness becomes interested *after the attestation*, in general, proof of his handwriting is admissible, as where he becomes administrator. *Godfrey v. Norris*, 1 *Str.* 34. 2 *East*, 183. But in some cases, as of a witness becoming partner, it has been held otherwise. *Hovill v. Stephenson*, 5 *Bingh.* 493. Where the name of a witness is inserted, *Fasset v. Brown, Peake*, 23, or where the attesting witness denies all knowledge of the execution; *Talbot v. Hodgson*, 7 *Taunt.* 251; *Fitzgerald v. Elsee*, 2 *Campb.* 635; evidence of the handwriting of the party is sufficient proof of its execution. So where an attesting witness subscribes his name without the knowledge or consent of the parties. *M'Craw v. Gentry*, 3 *Campb.* 232.

Where there are two attesting witnesses, and one of them cannot be produced, being dead, &c. it is not sufficient to prove his handwriting, but the other witness must be called. *Cunliffe v. Sefton*, 2 *East*, 183. *M'Craw, v. Gentry*, 3 *Campb.* 232. But if neither can be produced, proof of the handwriting of one only is sufficient. *Adam v. Kerr*, 1 *B. & P.* 360.

Proof of private documents — evidence of handwriting.] Where a party cannot sign his name, but makes his mark, that mark may be proved by a person who has seen him make the mark, and is acquainted with it. *George v. Surrey, Moo. & M.* 516. Where a witness had seen the party execute a bail-bond, but had never seen him write his name on any other occasion, and stated that the signature to the bond produced, was like the handwriting which he saw subscribed, but that he had no belief on the subject, this was held to be evidence of the handwriting to go to the jury. *Garrells v. Alexander*, 4 *Esp.* 37. But it is otherwise, where the witness has only seen the party write his name once, and then for the purpose of making the witness competent to give evidence in the suit. *Stranger v. Searle*, 1 *Esp.* 14. Where the witness stated that he had only seen the party upon one occasion sign his name to an instrument, to which he was attesting witness, and that he was unable to form an opinion as to the handwriting, without inspecting that other instrument, his evidence was held inadmissible. *Filliter v. Minchin, Mann. Index*, 131. In another case, under similar circumstances, Dallas, J. allowed a witness to refresh his memory, by referring

to the original document, which he had formerly seen signed. *Burr v. Harper, Holt, N. P. C.* 420. It is sufficient, if the witness has seen the party write his surname only. *Lewis v. Sapio, Moo. & Mal.* 39 ; *overruling Powell v. Ford,* 2 *Stark.* 164.

It is not essential to the proof of handwriting, that the witness should have seen the party write. There are various other modes in which he may become acquainted with the handwriting. Thus, where a witness for the defendant stated that he had never seen the person in question write, but that his name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signature, so as to form an opinion which enabled him to say he believed the handwriting in question was genuine, this was held by Park, J. to be sufficient. *Smith v. Sainsbury,* 5 *C. & P.* 196. So where letters are sent, directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. *Per Lord Kenyon, Cary v. Pitt, Peake Ev. App.* 86. And in general, if a witness has received letters from the party in question, and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting. *Tharpe v. Giburne,* 2 *C. & P.* 21. And the receipt of letters, although the witness has never done any act upon them, has been held sufficient. *Doe v. Wallinger, Mann. Index,* 131.

In general a document cannot be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine; and the reason is, that specimens might be unfairly selected, and calculated to serve the purposes of the party producing them, and therefore not exhibiting a just specimen of the general character of the handwriting. *See Burr v. Harper, Holt,* 421. Thus an inspector of franks at the post-office, who has never seen the party write, though perfectly acquainted with his handwriting on franks, has been rejected as a witness. *Batchelor v. Honeywood,* 2 *Esp.* 714. In the case of ancient documents, where it is impossible that the usual proof of handwriting can be given, the rule as to comparison of hands does not apply. *B. N. P.* 236. Thus authentic ancient writings may be put into the hands of a witness, and he may be asked whether, upon a comparison of those, with the document in question, he believes the latter to be genuine. *Doe v. Tarver, Ry. & Moo. N. P. C.* 142. 7 *East,* 282.

The rule as to comparison of handwriting does not apply to the *court* or the *jury,* who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting, *Griffiths v. Williams,* 1 *Crom. & Jerv.* 47. *Solita v. Yarrow,* 1 *Moo. & Rob.* 133. But the document with

which the comparison is made must be one already in evidence in the case, and not produced merely for the purposes of the comparison. Thus, where upon an indictment for sending a threatening letter, in order to prove the handwriting to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, Bolland, B., after considering *Griffiths v. Williams*, rejected the evidence, observing, that to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. *Morgan's case*, 1 *Moo. & Rob.* 134. (*n*).

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *R. v. Longnor*, 4 *B. & Ad.* 447. In such case the subscription of the name by the agent, and his authority to subscribe it, must be proved.

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled. Such evidence was admitted in one case. *Goodtitle v. Braham*, 4 *T. R.* 497. But in a subsequent case, Lord Kenyon, who had presided in the case of *Goodtitle v. Braham*, rejected similar evidence. *Cary v. Pitt*, *Peake Ev. App.* lxxxv. It was admitted again by Hotham, B. (*Cator's case*, 4 *Esp.* 117.); and again rejected in *Gurney v. Langlands*, 5 *B. & A.* 330. Upon the point coming before the Court of K. B., in the last cited case, they refused to disturb the verdict, on the ground of the evidence having been rejected.

Stamps.] In general, in criminal as well as in civil cases, a document, which is by law required to be stamped, cannot be given in evidence without a stamp, unless, as in the cases after mentioned, the instrument itself is the subject matter of the offence. Thus, where upon an indictment for embezzlement, in order to prove the receipt of the money, evidence was tendered of an unstamped receipt for it, given by the prisoner, it was rejected by Bayley, J. *Hall's case*, 3 *Stark. N. P. C.* 67. Upon an indictment for setting fire to a house, with intent to defraud an insurance company, in order to prove the insurance, a policy, not properly stamped, was given in evidence, and the prisoner was convicted; on a case reserved, the conviction was held wrong, by six judges against five. *Gibson's case*, *Russ. & Ry. C. C.* 138, 2 *Leach*, 1007, 1 *Taunt.* 98. *S. C.*

But where the unstamped instrument is offered in evidence,

not for the purpose of proving that, which, had it been genuine, it would have proved, but merely as evidence against the prisoner, of the commission of the offence with which he is charged, it is then admissible without a stamp. The prisoner was indicted for forging a bill of exchange, and it was objected for him, that there was no stamp upon it, and that it could not be received in evidence; but Buller, J. said, that the stamp act was merely a revenue law, and did not purport in any way to alter the law of forgery, and that the false instrument had the semblance of a bill of exchange, and had been negociated by the prisoner as such, and overruled the objection. Upon a case reserved, the judges were of opinion that the prisoner was properly convicted. *Hawkeswood's case*, 2 *East*, *P. C.* 955, 1 *Leach*, 257., *stated post*. A similar objection having been taken in another case, most of the judges maintained the principle in *Hawkeswood's case* to be well founded. *Morton's case*, 2 *East*, *P. C.* 955, *stated post*. *See also Reculist's case*, 2 *East*, *P. C.* 956, 2 *Leach*, 703. *S. C. Teague's case*, 2 *East*, *P. C.* 979. If the matter be duly considered, says Mr. East, the words of the stamp acts can only be applicable to true instruments, for a forged instrument, when discovered to be such, can never be made available, though stamped. The acts, therefore, can only be understood as requiring stamps on such instruments as were available without a stamp before those acts passed, and which would be available afterwards, with a stamp. 2 *East*, *P. C.* 956.

Where the unstamped document is produced in evidence, not as forming the subject matter of the offence, but for a collateral purpose (not being its proper object), it is admissible. Of this rule there are many instances in civil actions. *See Rosc. Dig. Ev. N. P.* 121. 3*d ed.* And upon an indictment under 7 Geo. 3. c. 50. s. 2., for stealing a letter out of the post-office, a check contained in the letter, though drawn on unstamped paper, was received in evidence, for the purpose of proving the fact of the letter having been stolen. *Pooley's case*, 2 *Leach*, 900, 1 *East*, *P. C. Add.* xvii, 3 *Bos. & Pul.* 315. *S. C.*

AIDERS, ACCESSORIES, &c.

Proof with regard to Aiders and Abettors . . 166
What presence is sufficient to make a party principal in the second degree . . . 166
Punishment 167
Proof with regard to Accessories before the fact . 167
By the interposition of a third person . . 168
Degree of incitement . . . 168
Principal varying from orders given to him . 168
What Offences admit of Accessories . . 170
Trial and punishment . . . 170
Proof with regard to Accessories after the fact . 171

Under this head will be considered the evidence against aiders, or principals in the second degree, against accessories before the fact, and accessories after the fact.

Proof with regard to aiders and abettors.] Although the law on this subject was formerly not well settled, it is now clear that all those who are present, aiding and abetting, where a felony is committed, are principals in the second degree. 1 *Russell*, 21. *Coalheaver's case*, 1 *Leach*, 66. *Foster*, 428.

With regard to the *nature* of the felony, it has been held that the rules with regard to principals in the second degree, apply equally to felonies created by statute, as to those offences which are felonies at common law. *Tattersall's case*, 1 *Russell*, 22.

Proof with regard to aiders and abettors—what presence is sufficient to make a party a principal in the second degree.] With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said by Mr. Justice Foster, that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged, they are all, provided the fact be committed, in the eye of the law present at it. *Foster*, 350. Thus where A. waits under a window, while B. steals articles in the house,

which he throws through the window to A., the latter is a principal in the offence. *Owen's case*, 1 *Moody, C. C.* 96, *stated post.*

Where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers employed by the messenger of the secretary of state, to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all. Holt, C. J. observing upon this case, says, that they were all engaged in an unlawful act is plain; for they could not justify breaking a man's house without first making a demand. Yet all those who were not guilty of stealing were acquitted, notwithstanding their being engaged in an unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands. *Anon.* 1 *Leach*, 7. (*n.*) 1 *Russell*, 24.

Either an actual presence, or such a presence as may be sufficient to afford aid and assistance to the principal in the first degree, is necessary, in order to render a party guilty as a principal in the second degree. *See Soare's case, Russ. & Ry.* 25. *Davis's case, Id.* 113. *Else's case, Id.* 142. *Badcock's case, Id.* 249. *King's case, Id.* 332. *M'Makin's case, Id.* 333, (*n.*) *Kelly's case, Id.* 421. *Stewart's case. Id.* 363, *all stated post.*

Aiders and abettors—punishment.] Considerable doubts formerly existed with regard to the punishment of aiders and abettors, but now by 7 & 8 Geo. 4. c. 29. s. 61. in case of every felony punishable under that act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by that act punishable. And by 7 & 8 Geo. 4. c. 30. s. 26. in the case of every felony punishable under that act, every principal in the second degree shall be punishable with death, or otherwise, in the same manner as a principal in the first degree is by that act punishable.

What circumstances will render a party liable as a principal in particular offences, will be found stated in the subsequent part of this work.

Proof with regard to accessories before the fact.] An accessory before the fact, is defined by Lord Hale to be one who, being absent at the time of the offence committed, does yet procure, counsel, command or abet another to commit a felony.

1 *Hale, P. C.* 615. But words amounting to a bare permission will not render a man an accessory, as if A. says he will kill J. S., and B. says "you may do your pleasure for me." *Hawk. P. C. b.* 2. *c.* 29. *s.* 16. If the party was *present* when the offence was committed, he is not an accessory, and if indicted as such, he must be acquitted, but he may be subsequently indicted as an accessory. *Gordon's case,* 1 *Leach,* 515. 1 *East, P. C.* 352.

Proof with respect to accessories before the fact, by the intervention of a third person.] A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A. bid his servant hire somebody to murder B., and furnish him with money for that purpose, and the servant hires C., a person whom A. never saw or heard of, who commits the murder, A. is an accessory before the fact. *Macdaniel's case, Foster,* 125. *Hawk. P. C. b.* 2. *c.* 29. *ss.* 1. 11. 1 *Russell,* 31.

Proof with regard to accessories before the fact—degree of incitement.] Upon the subject of the degree of incitement and the force of persuasion used, no rule is laid down. That it was sufficient to effectuate the evil purpose is proved by the result. On principle, it seems that any degree of direct incitement, with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed, although the incitement had never taken place. 2 *Stark. Ev.* 8. 2*d ed.*

Proof with regard to accessories before the fact—principal varying from orders given to him.] With regard to those cases where the principal varies, in committing the offence, from the command or advice of the accessory, the following rules are laid down by Sir Michael Foster. If the principal totally and substantially varies; if, being solicited to commit a felony of one kind, he *wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal *in substance* complies with the command, varying only in the circumstances of time, or place, or manner of execution, in these cases the person soliciting to the offence, will, if absent, be an accessory before the fact, or if present, a principal. A. commands B. to murder C. by poison; B. does it by a sword or other weapon, or by some other means; A. is accessory to this murder, for the murder of C. was the principal object, and

that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such order or advice, will be an accessory to that felony. A. upon some affront given by B., orders his servant to waylay him and beat him. The servant does so, and B. dies of the beating; A. is accessory to this murder. A. solicits B. to burn the house of C.; he does so, and the flames catching the house of D., that also is burnt. A. is an accessory to this felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence. *Foster*, 369, 370, *see also* 1 *Hale, P. C.* 617. *Hawk. P. C. b.* 2. *c.* 29. *s.* 18.

Where the principal *wilfully* commits a different crime from that which he is commanded or advised to commit, the party counselling him, will not, as above stated, be guilty as accessory. But whether, where the principal *by mistake*, commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Lord Hale, that if A. command B. to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C.; A. is not accessory to the murder of D., because it differs in the person. 1 *Hale, P. C.* 617, *citing* 3 *Inst.* 51, *Saunders's case*, *Plow. Com.* 475. The circumstances of *Saunders's case*, cited by Lord Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat, and the wife having eaten a small part of it, and given the remainder to their child, Saunders, making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to the murder.

Upon the law as laid down by Lord Hale, and upon *Saunders's case*, Mr. Justice Foster has made the following observations, and has suggested this case: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B. answering the description, unhappily coming by, is murdered under a strong belief on the part of B., that he is the man marked out for destruction. Who is answerable? Undoubtedly A.; the malice on his part *egreditur personam*. The pit, which he, with a murderous intention, dug for C., D. fell into

and perished. Through his guilt, B. not knowing the person of C., had no other guide to lead him to his prey than the description of A., and in following this guide he fell into a mistake, which it is great odds any man in his circumstances might have fallen into. "I, therefore," continues the learned writer, "as at present advised, conceive that A. was answerable for the consequences of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." *Foster*, 370.

With regard to *Archer's case*, the same learned author observes, that the judges did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal, but for example's sake, kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown. *Ibid.* 371.

Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to rest. Did the principal commit the felony he stands charged with, under the flagitious advice, and was the event in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject? *Foster*, 372, *see also Hawk. P. C. b. 2. c. 29. s. 22.*

If, before the commission of the offence by the principal, the accessory countermands him, and yet the principal proceeds to the commission of the offence, he who commanded him will not be guilty as accessory. 1 *Hale, P. C.* 618.

Proof with regard to accessories before the fact—what offences admit of accessories.] With regard to the particular offences which admit of accessories, it is held that in high treason there can be no accessories, but all are principals, every act of incitement, aid or protection, which in felony would render a man an accessory before or after the fact, in the case of high treason, (whether by common law or by statute) making him a principal. *Foster*, 341, 4 *Bl. Com.* 35. So in all offences below felony there can be no accessories. 1 *Hale, P. C.* 613, 4 *Bl. Com.* 36. It is said in the older books, that in forgery all are principals, (*see* 2 *East, P. C.* 973.) but this, it appears, must be understood of forgery at common law, which is a misdemeanor. *Id.* Where a statute creates a new felony, without mentioning accessories, yet the law respecting accessories is applicable to the new offence. 1 *Hale, P. C.* 613, 614. 2 *East, P. C.* 973. 1 *Russell*, 32.

Accessories before the fact—trial and punishment.] Before the statute 7 Geo. 4. c. 64, accessories could not be punished until the guilt of the principal offender was established. It was

necessary, therefore, either to try them after the principal had been convicted, or upon the same indictment with him, and the latter was the usual course. 1 *Russell*, 36. But now by the 9th section of the above statute, it is enacted, that if any person shall counsel, procure, or command any other person to commit any felony, whether the same shall be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within his Majesty's dominions or without.

And that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding, shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person, who shall be once duly tried for any such offence, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

By stat. 7 & 8 G. 4. c. 29. s. 61, every accessory before the fact, in case of any felony under that act, shall be punishable with death or otherwise, in the same manner as a principal in the first degree; and there is a similar provision in 7 & 8 G. 4. c. 30. s. 26. with regard to offences under that act.

Proof with regard to accessories after the fact.] An accessory after the fact, says Lord Hale, is where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale, P. C.* 618. But a feme covert does not become an accessory by receiving her husband. This, however, is the only relationship which will excuse such an act, the husband being liable for receiving the wife. 1 *Hale, P. C.* 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessories, in the

same manner as a stranger would be. *Hawk. P. C. b.* 2. *c.* 29. *s.* 34. If husband and wife knowingly receive a felon, it shall be deemed to be the act of the husband only. 1 *Hale, P. C.* 621.

With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down, that generally, any assistance whatever, given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where any one harbours and conceals in his house a felon under pursuit, in consequence of which, his pursuers cannot find him; much more, where the party harbours a felon, and the pursuers dare not take him. *Hawk. P. C. b.* 2. *c.* 29. *s.* 26. *See Lee's case,* 6 *C. & P.* 536. So it appears to be settled that, whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. *Id. s.* 27. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaolor to let him escape, makes the party an accessory. But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 *Bl. Com.* 38.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounded another mortally, and after the wound given, but before death ensued, a person assisted or removed the delinquent, this did not, at common law, make him accessory to the homicide, for till death ensued, there was no felony committed. *Hawk. P. C. b.* 2. *c.* 29. *s.* 35. 4 *Bl. Com.* 38.

In order to render a man guilty as accessory, he must have notice either express or implied, of the principal having committed a felony. *Hawk. P. C. b.* 2. *c.* 29. *s.* 32. It was formerly considered, that the attainder of a felon, was a notice to all persons in the same county of the felony committed, but the justice of this rule has been denied. *Hawk. P. C. b.* 2. *c.* 29. *s.* 83. It was observed by Lord Hardwicke, that though this may be some evidence to a jury of notice to an accessory in the same county, yet it cannot, with any reason or justice, create an absolute presumption of notice. *Burridge's case,* 3 *P. Wms.* 495.

With regard to the trial of accessories after the fact, (*vide ante, p.* 170, as to the former law,) it is enacted by the 7 G. 4. c. 64. s. 10. "That if any person shall become an accessory after the fact, to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the

act by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas, or at any place on land, whether within his majesty's dominions or without. And that in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory, shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties. Provided always, that no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the same offence."

Since the above statute an accessory after the fact may be tried, either at the same time with the principal felon, or after his conviction. If the principal has been formerly convicted, and that conviction is alleged in the indictment, it must be proved in the ordinary way by an examined copy. The conviction appears to be evidence, not only of the *fact* of the principal *having been convicted*, but also to be *primâ facie* evidence, that he was *guilty* of the offence of which he was so convicted. *Foster*, 365, 2 *Stark. Ev.* 7. 2*d ed. and vide post, title "Receiving stolen goods."*

If A. be indicted as accessory to B. and C., he may be convicted on evidence that he was accessory to C. only. *Wallis's case*, 1 *Salk.* 334.

An accessory may avail himself of every matter, both of law and fact, to controvert the guilt of his principal, and the record of the conviction of the principal is not conclusive against him. *Foster*, 365, *Smith's case*, 1 *Leach*, 288, *Prosser's case*, *Id.* 290. (*n.*) 1 *Russell*, 39, *Cook v. Field*, 3 *Esp.* 134. *and see post, title "Receiving stolen goods."*

Wherever a variance is material as to the principal, it is material and available as to the accessory; and *vice versâ*, where a variance is immaterial to the principal it is immaterial to the accessory. 2 *Stark. Ev.* 9. 2*d ed. Hawk. P. C. b.* 2. *c.* 26. *s.* 178, 9.

The prisoner ought not to be charged in the same indictment, both as principal and receiver; and if he be so charged, the court will put the prosecutor to his election. *Galloway's case*, 1 *Moody, C. C.* 234. *Madden's case*, *Id.* 277. *Gough's case*, 1 *Moo. & R.* 71.

PRACTICE.

Arraignment 174
Plea—imparlance—traverse . . . 175
Quashing indictment . . . 177
Opening the case 177
Discharge of Jury 177
Former conviction 178
Trial 179
Verdict 179
Judgment 179
Costs, expenses, and rewards . . . 180

Arraignment in general.] A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanors. 1 *Chitt. C. L.* 414. 4 *Bl. C.* 375.

If the prisoner upon his arraignment refuse to answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. The court will in such case direct a jury to be impanelled, who are immediately returned, *Jones's case*, 1 *Leach*, 102, from amongst the by-standers, 1 *Chitty, C. L.* 424; and where a verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if the prisoner is of competent intellect, and can be made to understand the nature of the proceedings against him. Thus where it appeared that a prisoner who was found mute, had been in the habit of communicating by means of signs, and a witness was called who stated that he was capable of understanding her by means of signs, he was arraigned, put upon his trial, convicted of simple larceny, and received sentence of transportation. *Jones's case*, 1 *Leach*, 102. 1 *Russ.* 7.

If the prisoner stands mute of malice, or will not answer directly to the indictment, or information, (for treason, felony, piracy, or misdemeanor,) it is enacted by the 7 & 8 G. 4. c. 28. s. 2. that in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty," on behalf of such person, and the plea so entered, shall have the same effect as if such person had actually pleaded the same. Where the prisoner refused to plead on the ground that he had already pleaded to an indictment for

the same offence, (which had been tried before a court not having jurisdiction,) it was held that the court might order a plea of "not guilty," to be entered for him under the above statute. *Bitton's case*, 6 *C. & P.* 92.

In cases of insanity, it is enacted by the 39 & 40 G. 3. c. 94. s. 2. that if a person indicted for any offence appears insane, the court may, on his arraignment, order a jury to be impanelled to try the sanity, and if they find him insane, may order the finding to be recorded, and the insane person to be kept in custody till his majesty's pleasure be known. And by the same statute, s. 1, if upon the trial for treason, murder, or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the court must order him to be kept in custody till his majesty's pleasure be known.

The above enactment applies to misdemeanors as well as to felonies. *Little's case*, *Russ. & Ry.* 430.

By the stat. 7 & 8 G. 4. c. 28. s. 1. it is enacted, "That if any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly."

Plea — imparlance — traverse.] As to imparlance, it is enacted by the stat. 60 G. 3. and 1 G. 4. c. 4. "That, where any person shall be prosecuted in his majesty's courts of King's Bench (at Westminster or Dublin,) for any misdemeanor, either by information or by indictment there found, or removed into that court, and shall appear in term time in either of the said courts respectively, in person, to answer to such indictment or information, such defendant, upon being charged therewith, shall not be permitted to imparle to a following term; but shall be required to plead or demur thereto, within four days from the time of his or her appearance; and in default of his or her pleading or demurring within four days as aforesaid, judgment may be entered against the defendant for want of a plea; and in case such defendant shall appear to such indictment or information by his or her clerk or attorney in court, it shall not be lawful for such defendant to imparle to a following term, but a rule requiring such defendant to plead may forthwith be given; and a plea or demurrer to such indictment or information enforced, or judgment by default entered thereupon, in the same manner as might have been done before the passing of this act, in cases

where the defendant had appeared to such indictment or information by his or her clerk in court, or attorney, in a previous term."

But by sect. 2. the court, or a judge, may, on sufficient cause shown, allow further time for the defendant to plead or demur.

By sect. 3. it is enacted, "That where any person shall be prosecuted for any misdemeanor, by indictment, at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within that part of Great Britain called England, or in Ireland, having been committed to custody, or held to bail to appear to answer for such offence, twenty days at the least before the sessions at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery, respectively, unless a writ of *certiorari* for removing such indictment into his Majesty's Courts of King's Bench at Westminster or in Dublin, respectively, shall be delivered at such session before the jury shall be sworn for such trial." And by sect. 4. it is enacted, that the writ of *certiorari* may issue as well before indictment found as after.

And by sect. 5. it is enacted, "That where any person shall be prosecuted for any misdemeanor, by indictment, at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within the part of Great Britain called England, or in Ireland, not having been committed to custody, or held to bail to appear to answer such offence, twenty days before the session at which such indictment shall be found, but who shall have been committed to custody, or held to appear to answer such offence at some subsequent session, or shall have received notice of such indictment having been found, twenty days before such subsequent session, he or she shall plead to such indictment, at such subsequent session, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session or session of gaol delivery, respectively, unless a writ of *certiorari* for removing such indictment into his Majesty's Courts of King's Bench at Westminster or in Dublin, respectively, shall be delivered at such last mentioned session, before the jury shall be sworn for such trial."

And by sect. 7. it is also provided, "That the court at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, upon sufficient cause shown, may allow further time for pleading to the indictment or for the trial."

Where a person pleads a plea of *autre fois convict*, the court will not reject it on the ground of informality, but will assign

counsel to put it into a formal shape, and will postpone the trial. *Chamberlain's case*, 6 *C. & P.* 93.

Quashing indictments.] Where an indictment is so defective that in case of conviction no judgment could be given, the court will in general quash it. The application to quash must be made in the court in which the bill is found, except in cases of indictments at sessions, and in other inferior courts, in which cases the application is made to the Court of King's Bench, the record being previously removed there by *certiorari*. *Archb. C. L.* 68. 4*th ed.* If the application is made on behalf of the defendant, the court will not grant it unless the defect is very clear and obvious, but will leave him to demur. 1 *Chitty, C. L.* 299.

Where the indictment comes on for trial as a *ni. i prius* record, and it is found to be so framed that no judgment can be given upon it, the judge, it is said, will order it to be struck out of the paper, and if the jury have been sworn, will direct them to be discharged. *Carr. Suppl. C. L.* 82. 2*d ed.* But counsel will not be allowed to argue at length, at *nisi prius*, the invalidity of an indictment, for the purpose of inducing the court not to try it, though it may be convenient to permit them to suggest the point. *Abraham's case*, 1 *Moody & Rob.* 7.

Opening the case.] In opening the case in prosecutions for felony, it is usual to make the statement in general terms. Where the counsel for the prosecution was proceeding to state the details of a conversation which one of the witnesses had had with the prisoner, upon an objection being taken, the court said that in strictness he had a right to pursue that course, *Deering's case*, 5 *C. & P.* 165, and the same rule was laid down in *Swatkins's case*, 4 *C. & P.* 548, but the judges in that case stated, that the correct practice was only to state the general effect of the conversation. 5 *C. & P.* 166, (*n.*) In a later case however, Parke B. after consulting Alderson B. ruled that with regard to conversations, the fair course to the prisoner was to state what it was intended to prove. *Orrell's case M. S. Lanc. Sp. Ass.* 1835.

Jury, discharge of.] If a juryman be taken ill so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*, or another juryman may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*. *Edward's case, Russ. & Ry.* 224, 4 *Taunt.* 309, 2 *Leach*, 621, (*n.*) So if during the trial the prisoner be taken so ill that he is incapable of remaining at the bar, the judge may discharge the jury, and on the

prisoner's recovery another jury may be returned; and the proceedings commenced *de novo*. The court, on a trial for a misdemeanor, doubted whether in such a case the consent of counsel was sufficient to justify the proceeding with the trial in the absence of the defendant. *Streek's case, coram Park, J.* 2 *C. & P.* 413.

When the evidence on both sides is closed, or after any evidence has been given, the jury cannot be discharged unless in case of evident necessity, (as in the cases above mentioned,) till they have given in their verdict, but are to consider of it and deliver it in open court. But the judges may adjourn while the jury are withdrawn to confer, and may return to receive the verdict in open court. 4 *Bl. Com.* 360. And when a criminal trial runs to such length that it cannot be concluded in one day, the court by its own authority may adjourn till next morning. But the jury must be kept together (at least in a capital case) that they may have no communication but with each other. 6 *T. R.* 527. *Stephen's Summary*, 313. It is a general rule that upon a criminal trial there can be no separation of the jury after the evidence is entered upon, and before a verdict is given. *Langhorn's case*, 7 *How. St. Tr.* 497. *Hardy's case*, 24 *Id.* 414. In the latter case, on the first night of the trial, beds were provided for the jury, at the Old Bailey, and the court adjourned till the next morning. On the second night, with the consent of the counsel on both sides, the court permitted the jury to pass the night at a tavern, whither they were conducted by the under-sheriffs and four officers sworn to keep the jury. *Id.* 572.

It is not a sufficient ground for discharging a jury, that a material witness for the crown is not acquainted with the nature of an oath, though this is discovered before any evidence given. *Wade's case*, 1 *Moody, C. C.* 86.

If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 *Hale, P. C.* 34, 18 *St. Tr.* 411, *Russ. & Ry.* 431, (*n.*)

On a trial for manslaughter, when it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent, the prisoner praying that the jury might be discharged; they were discharged accordingly, and the prisoner was tried the next day. *Stokes's case*, 6 *C. & P.* 151.

Former conviction.] By stat. 7 & 8 Geo. 4. c. 28. s. 11. after reciting that it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this act; it is enacted, "That if any person shall be convicted of any felony, not punishable with death, committed after a previous

conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eight pence, and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

After some discussion and difference of opinion amongst the judges, it has been settled that the allegation of a previous conviction is to be considered as a part of the indictment; that the prisoner when called upon to plead, must plead to it as such, and that the jury must be charged at the outset of the inquiry with the whole matter, which they have to try. *Lewin, C. C.* 148.

With regard to the time of proving a previous conviction, it has been held by the judges that it must be proved before the prisoner is called upon for his defence. *Jones's case*, 6 *C. & P.* 391.

Trial.] The judges of assize have authority, and ought to try indictments found at the quarter sessions, and transmitted to them for trial by the justices. *Wetherell's case, Russ. & Ry.* 381. *Lewin, C. C.* 208. The judge may postpone a trial for felony as well as for a misdemeanor. *Meade's case, Lewin, C. C.* 315.

Verdict.] If by mistake the jury deliver a wrong verdict, (as where it is delivered without the concurrence of all) and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected. *Parkin's case*, 1 *Moody, C. C.* 46.

The jury have a right to find either a general or a special verdict. 4 *Bl. Com.* 361. 1 *Chitty, C. L.* 637. 642.

Judgment.] By stat. 11 Geo. 4. and 1 Will. 4. c. 70. s. 9.

it is enacted, " that upon all trials for felonies or misdemeanors, upon any record in the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of *nisi prius*, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had, or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to, and confined in prison."

An offender, upon whom sentence of death has been passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. *Anon. Russ. & Ry.* 268.

Costs, Expenses, and Rewards.] As to costs, expenses, and rewards in cases of felony, see stat. 7 G. 4. c. 64. s. 22. *ante, p.* 91.

Where a prisoner did not reach the assize town until after the grand jury were discharged, Hullock, B. after referring to the above statute, ordered the witnesses their expenses. *Anon. Lewin, C. C.* 128. Where in consequence of the absence of the prosecutor, the trial was put off, and the prisoner applied for costs, Littledale, J. refused the application, saying, that costs were never allowed to a prisoner charged with felony. *Cow's case, Lewin, C. C.* 131, 4 *C. & P.* 251. *S. C.* Where the prisoner in a case of felony was at large and did not appear, the expenses of the prosecutor and witness, who had been bound over to appear by the coroner, were allowed. *Flanning's case, Lewin, C. C.* 133. *Anon. Id.* 134. Upon an indictment for felony, removed by *certiorari* into the King's Bench, and tried at *nisi prius*, no costs can be allowed by this statute either there or by the King's Bench. *R. v. Treasurer of Exeter*, 5 *M. & R.* 167.

The usual expenses of prosecution may be allowed by the

proper officers of the court, but the fees attendant on the examination, and the allowance to the prosecutor and his witnesses, on attending before the magistrate, can only be allowed on the production of the certificate mentioned in the act; and the court has no power to allow the expenses of witnesses attending before the coroner previous to the indictment. *Rees' case*, 5 *C. & P.* 302, *Taylor's case*, 5 *C. & P.* 301. No costs will be allowed before the trial has actually taken place, as when it is postponed. *Hunter's case*, 3 *C. & P.* 591.

The prosecutor and his witnesses being bound over, attended at the assizes and preferred an indictment, which was found. The prisoner, who had been discharged by mistake, had absconded. Mr. Justice Taunton said, that under the authority of the word "prosecute" by the statute, he thought he might order the expenses, but that if no bill had been preferred, he thought he should have had no authority. *Robey's case*, 5 *C. & P.* 552.

As to the expenses in cases of misdemeanor, see stat. 7 G. 4. c. 64. s. 23. *ante, p.* 92.

Where an indictment was removed from the sessions by *certiorari*, at the instance of the prosecutor, and tried at *nisi prius*, and the prosecutor, who was not under recognizance, caused himself and his witnesses to be subpœnaed and paid their expenses, it was held that neither the court at *nisi prius* nor the King's Bench could give costs under the above statute. *Johnson's case*, *Moo.*, *C. C.* 173, *Richard's case*, 8 *B. & C.* 420. In the case of misdemeanors, not within the act, if the defendant submits to a verdict on an understanding that he shall not be brought up for judgment, the prosecutor is not, without a special agreement, entitled to costs. *Rawson's case*, 2 *B. & C.* 598, 1 *D. & R.* 124. *S. C.*

An indictment for endeavouring to conceal the birth of a child is not within the above clause, and no expenses can be allowed; *Anon. Lewin*, *C. C.* 45; which has led to a practice reprobated as highly cruel and improper, of indicting the party in the first instance for murder. *Ibid.*

Mode of payment by the treasurer of the county, &c.] By the stat. 7 G. 4. c. 64. s. 24. it is enacted, "That every order for payment to any prosecutor, or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court, unto such prosecutor, or other person, upon being paid for the same the sum of one shilling for the prosecutor, and sixpence for each other person, and no more, and except in the cases therein after provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is thereby authorised and required, upon sight of every such order, forthwith to pay to the person named

therein, or to any one duly authorised to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

With respect to places that do not contribute to any county rate.] The stat. 7 G. 4. c. 64. s. 25. after reciting that "whereas felonies, and such misdemeanors as are thereinbefore enumerated, may be committed in liberties, franchises, cities, towns and places, which do not contribute to the payment of any county rate, some of which raise a rate in the nature of a county rate, and others have neither any such rate, nor any fund applicable to similar purposes, and it is just that such liberties, franchises, cities, towns and places, should be charged with all costs, expenses, and compensations, ordered by virtue of this act, in respect of felonies and such misdemeanors, committed therein respectively," enacts "That all sums directed to be paid by virtue of this act, in respect of felonies, and of such misdemeanors as aforesaid, committed or supposed to have been committed in such liberties, franchises, cities, towns and places, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns and places, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein, where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last mentioned rate or fund, and the order of court shall in every such case be directed to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require."

Expenses of prosecution for capital offences in exclusive jurisdictions.] By stat. 60 G. 3. c. 14. s. 3. it is provided, "That in all cases of any commitment to the county gaol, under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow, by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke or place, within which such offence shall have been committed, in like manner, and to be raised by the same means whereby such expenses would have been raised and paid, if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction, and that the judge or court of oyer and terminer, and general gaol delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper, and also to direct by whom

and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who, by the custom and usage of such place ought to pay the same in the first instance."

Rewards for the apprehension of offenders.] By stat. 7 G. 4. c. 64. s. 28. it is enacted, "That where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary, or felonious house-breaking, or with robbery on the person, or with arson, or with horse stealing, bullock stealing, or sheep stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient, to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to any court of sessions of the peace, to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such person, in the same manner as the other courts herein before mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively."

And by the stat. 7 G. 4. c. 64. s. 29. it is enacted, "That every order for payment to any person, in respect to such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings, and no more; and the sheriff of the county for the time being is hereby authorised and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorised on his or her

behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

With regard to the offences to which the above section extends, it was held by Hullock that the case of *sacrilege* was not included, not coming within the words *burglary* or housebreaking. *Robinson's case, Lewin, C. C.* 129. And on the authority of this case, Bolland, B. refused a similar application, though both he and Parke, J. would otherwise have been disposed to put a different construction upon the statute. *Ib.*

Allowance to the widows and families of persons killed in endeavouring to apprehend offenders.] By the stat. 7 G. 4. c. 64. s. 30. it is enacted, "That if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences herein before last mentioned, [in sect. 28.] it shall be lawful for the court before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court, and every such order shall be paid by and repaid to the sheriff in the manner herein before mentioned," [in the 29th section.]

The costs with regard to indictments for nuisances removed by *certiorari*, are regulated by stat. 3 W. & M. c. 11. s. 3. which enacts that if a defendant prosecuting a writ of *certiorari*, (as mentioned in the act) be convicted, the Court of King's Bench shall give reasonable costs to the prosecutor, if he be a party grieved, or be a justice, &c. or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Persons dwelling near a steam engine, which is a nuisance, have been held to be *parties grieved* within this act. *Dewsnap's case*, 16 *East*, 194. The costs in cases of nuisances arising from the furnaces of steam engines, are governed by the statute 1 & 2 G. 4. c. 41.

VENUE.

Under this head will be stated the various statutory provisions which have been lately made, with regard to the venue in different cases, and the decisions which have occurred upon the construction of those provisions. Some few general rules also relating to venue generally will be given. The law respecting venue in particular indictments will be found stated under the proper heads.

Offences committed on the boundary of counties, or partly in one county and partly in another.] By stat. 7 G. 4. c. 64. s. 12. (repealing 59 G. 3. c. 96,) it is enacted, that, where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

It has been held that this section does not extend to trials in limited jurisdictions, but only to county trials. *Welsh's case*, 1 *Moody, C. C.* 175.

Offences committed on persons or property in coaches employed on journeys, or in vessels employed in inland navigation.] By the stat. 7 G. 4. c. 64. s. 13. for the more effectual prosecution of offences committed during journeys from place to place, it is enacted, that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, wagon, cart or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed in any voyage or journey upon any navigable river, canal or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any county through any part whereof such coach, wagon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county ; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony

or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to, or by the boundary of any part whereof such coach, wagon, cart, carriage, or vessel, shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.

Offences committed in the county of a city or town corporate.] By stat. 38 G. 3. c. 52. it shall be lawful for any prosecutor to prefer his bill of indictment for any offence committed or charged to be committed within the county of any city or town corporate, to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king for the body of such adjoining county, at any session of oyer and terminer, or general gaol delivery, and every bill of indictment found to be a true bill by such jury, shall be valid and effectual in law, as if the same had been found to be a true bill by any jury, sworn and charged to inquire for the king for the body of the county of such city or town corporate.

Notwithstanding this statute, if the offence was in fact committed in the county of a city or town corporate, it must be so stated in the indictment, though the bill is found in the adjoining county. *Mellor's case, Russ. & Ry.* 144. It need not be averred in the indictment, that the county where the bill is found is the next adjoining county. When the record is regularly drawn up, it may appear in the memorandum of caption. *Goff's case, Russ. & Ry.* 179.

If the bill has been found by a jury of the county of a city, &c. any court of oyer and terminer, or gaol delivery, may order it to be tried by a jury of the next adjoining county. 38 G. 3. c. 52. s. 2. The court before which the offender is tried and convicted, may order the judgment to be executed either in the same county or in the county of a city in which the offence was committed. 51 G. 3. c. 100. s. 1. As to the expenses in these cases, see 38 G. 3. c. 52. s. 8., 51 G. 3. c. 100. s. 2., 60 G. 3. c. 14. s. 3., 7 G. 4. c. 64. s. 25.

Where an application was made under the above statute, to have an indictment for a misdemeanor, found by a grand jury of the county of the city of York, tried in the county of York, Parke, J. was of opinion that it would be necessary for the bail to surrender the defendant to the custody of the city gaolor, and that a *habeas corpus* should then issue to bring up the body, and that the judge should then commit him to the county gaol. The clerk of arraigns produced the indictment and recognizances, and the judge (pursuant to the terms of the act) made an order to have them filed amongst those of the county. *Roubattel's case, Lewin, C. C.* 278.

Offences committed in Wales.] In case of offences committed in Wales, the venue might formerly have been laid in the next adjoining English county, by the stat. 26 H. 8. c. 6. s. 6. which was held to extend to felonies created after its enactment. *Wyndham's case, Russ. & Ry.* 197. But that statute is impliedly repealed by the 11 G. 4. & 1 W. 4. c. 70. s. 14. and now, in indictments for offences committed in Wales, the venue must, as in England, be laid in the county in which the offence is committed, unless otherwise provided for by statute. *Archb. C. L.* 20, *4th. ed.*

Offences committed at sea, or within the admiral's jurisdiction.] By 28 H. 8. c. 15. all treasons, felonies, robberies, murders, and confederacies thereafter to be committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have or pretend to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same in the like form and condition, as if such offence or offences had been committed or done in or upon the land.

This statute being thought not to extend to felonies created subsequently by statute, the following act was passed to provide for these cases.

By stat. 39 G. 3. c. 37. s. 1. all and every offence and offences, which, after the passing of that act shall be committed upon the high seas, out of the body of any county of this realm shall be, and they are declared to be of the same nature respectively, and to be liable to the same punishment respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be tried by the 26 H. 8.

By the larceny act, 7 & 8 G. 4. c. 29. s. 77. where any felony or misdemeanor, punishable under that act shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction. Similar provisions are contained in the malicious injuries act, 7 & 8 G. 4. c. 30. s. 43; the act providing for offences against the person, 9 G. 4. c. 31. s. 32, and in other statutes.

It is often a question of some difficulty whether an offence was committed within the jurisdiction of the admiralty. With regard to the sea shore, it is clear that the common law and the admiralty have alternate jurisdiction between high and low water mark. 3 *Inst.* 113, 2 *Hale, P. C.* 17. Therefore if a man be wounded on the sea, or a creek of the sea at high-water, and on the reflux of the tide, dies on the spot which the

water had covered, the admiralty has no jurisdiction of this felony. *Lucie's case*, 2 *Hale, P. C.* 19, *Bingham's case*, 2 *Co.* 93. *a.*

The following authorities collected by Mr. East, are referred to by Mr. Serjeant Russell, as containing the general rules upon the subject of the admiralty jurisdiction. In general, it is said that such parts of the rivers, arms and creeks are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale, in his Treatise *De Jure Maris*, says that the arm or branch of the sea, which lies within the *fauces terræ, where a man may reasonably discern between shore and shore*, is or at least may be within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea, where a man standing on the one side of the land may see what is done on the other, and the reason assigned by Lord Coke in the Admiralty case, (13 *Co.* 52.) in support of the county coroner's jurisdiction, when a man is killed in such places, *because the county may well know it*, seems rather to support the more limited construction. But at least, when there is any doubt, the jurisdiction of the common law ought to be preferred. 2 *East, P. C.* 804. 1 *Russell*, 108.

In the following case the common law and the admiralty were held to have concurrent jurisdiction in a haven. A murder was committed in Milford Haven, seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, and the place itself about twenty-three feet deep, and never known *to be dry but at very low tides.* Sloops and cutters of 100 tons were able to navigate where the body was found, and nearly opposite the place men of war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven. The judges were unanimously of opinion that the trial was rightly had at the admiralty sessions, though the place was within the body of the county of Pembroke, and the courts of common law had concurrent jurisdiction. During the discussion, the construction of the statute 28 H. 8. c. 15. by Lord Hale was much preferred to the doctrine of Lord Coke in his Institutes, (3 *Inst.* 111, 4 *Inst.* 134,) and most if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers of this realm. *Bruce's case*, 2 *Leach*, 1093, *Russ. & Ry.* 243, *Anon. Lewin, C. C.* 242.

For offences against the customs, committed on the high seas, the venue may be laid in the county into which the offender is taken, and if he be taken to a city, borough, &c., then in the county in which such city or borough is situate. 3 & 4 *W.* 4. *c.* 53. *s.* 77. *See R. v. Nunn*, 8 *B. & C.* 644, 3 *M. & R.* 75.

Offences against excise, customs, stamps, &c.] In indictments for resisting or assaulting officers of the excise, 7 & 8 G. 4. c. 53. s. 43. or for offences against the revenue of the customs, 3 & 4 W. 4. c. 53. s. 122. the venue may be laid in any county. As to offences against the customs committed on the high seas, *Vide* 3 & 4 W. 4. c. 53. s. 77, 188. In indictments for offences against the stamp duties, the venue may be laid either in the county where the offence was committed, or in the county in which the parties accused or any of them shall have been apprehended. 53 G. 3. c. 108. s. 21.

Want of a proper venue, when cured.] By stat. 7 G. 4. c. 64. s. 20. no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.

Change of.] Where a fair and impartial trial cannot be had in the county where the venue is laid, the Court of King's Bench (the indictment being removed thither by *certiorari*) will, upon an affidavit stating that fact, permit a suggestion to be entered on the record, so that the trial may be had in an adjacent county. Good ground must be stated in the affidavit, for the belief that a fair trial cannot be had. *Clendon's case*, 2 *Str.* 911. *Harris's case*, 3 *Burr.* 1330, 1 *W. Bl.* 378. *Archb. C. L.* 26, *4th. ed.* The suggestion need not state the facts from which the inference is drawn, that a fair trial cannot be had. *Hunt's case*, 3 *B. & A.* 444. This suggestion when entered, is not traversable. 1 *Chitty, Crim. Law*, 201. And the venue in the indictment remains the same, the place of trial alone being changed. *Ibid.*

It is only, however, in cases of misdemeanor, that the Court of King's Bench will, in general, award a *venire* to try in a foreign county, though cases may occur in which the court would change the venue in felony. *Holden's case*, 5 *B. & Ad.* 347, 2 *Nev. & M.* 167. And even in cases of misdemeanor, the court has not exercised its discretionary power, unless there has been some peculiar reason, which made the case almost one of necessity. *Per Cur. Ib.*

Upon an indictment for a misdemeanor, the application to change the venue ought not to be made before issue joined. *Forbes's case*, 2 *Dowl. P. C.* 440.

EVIDENCE IN PARTICULAR PROSECUTIONS.

ABORTION.

Offence at Common Law 190
Procuring Abortion where the Woman is quick with Child.
9 *Geo.* 4. *c.* 31. 190
Proof of the intent 190
Proof of the administering 191
Proof of the nature of the thing administered . 191
Procuring abortion where the Woman is not quick with Child 192

Offence at common law.] A child *en ventre sa mere*, cannot be the subject of murder, *vide post*, "*Murder.*" At common law an attempt to destroy such a child appears to have been held to be a misdemeanor. 3 *Chitt. Cr. Law*, 798, 1 *Russ.* 553, 2*d. ed.* The offence is now provided for by the 9 G. 4. c. 31. s. 13.

Procuring abortion, where the woman is quick with child.] By 9 G. 4. c. 31. s. 13. if any person with intent to procure the miscarriage of any woman, then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatever, with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Upon an indictment under this section, the prosecutor must prove, 1. The intent to procure miscarriage; 2. That the woman was quick with child; 3. The administering or causing to be taken; 4. Some poison or other noxious thing, or the use of some instrument, or other means with like intent.

Proof of the intent.] The intent will probably appear from the other circumstances of the case. That the child was likely to be born a bastard, and to be chargeable to the reputed father, the prisoner, would be evidence to that effect. Proof of the clandestine manner in which the drugs were procured or administered would tend the same way.

Proof of being quick with child.] It must appear that the woman was quick with child. The prosecutrix swore that she was in the fourth month of her pregnancy, but that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men, in their examinations, differed as to the time when the *fœtus* may be stated to be quick, and to have a distinct existence, but they all agreed that in common understanding, a woman is not considered to be quick with child, till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although more usually about the fifteenth or sixteenth week after conception. Lawrence, J. said, that this was the interpretation which must be put upon the words *quick with child* in the statute, and as the woman had not felt the child alive within her before the medicine was taken, he directed an acquittal. *Phillip's case*, 3 *Campb.* 77.

Proof of the administering.] The prosecutor must then prove the *administering*, or *the causing to be taken* of the poison or other noxious thing.

Proof of the nature of the thing administered.] The nature of the poison or other noxious thing must be proved. Upon an indictment on the 43 G. 3. c. 58. s. 2. for administering *savin* to a woman not quick with child, with intent, &c. the charge was that the prisoner administered "six ounces of the *decoction* of a certain shrub called *savin*, then and there being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called an *infusion* and not a decoction. It was objected that the medicine was misdescribed, but Lawrence, J. overruled the objection. He said *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered *any matter or thing* to the woman with intent to procure abortion. *Phillip's case*, 3 *Campb.* 78. The authority of this decision appears to have been followed by Vaughan, B. in a very late case. The prisoner was indicted under the 9 G. 4. c. 31. s. 13. for administering saffron to the prosecutrix, with intent to procure abortion. The counsel for the prisoner cross-examining as to the innocuous nature of the article administered, Vaughan, B. said, "Does that signify? It is with the intention that the jury have to do: and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of parliament." *Coe's case*, 6 *C. & P.* 403. It should be observed that the words of the statute are, "shall administer any *poison* or other *noxious thing*," "or

shall use any instrument or *other means* whatever." The above case does not appear to be included within the former words of the statute, and it may be very questionable whether the words "other means whatever," are not to be confined to means *ejusdem generis* with instruments.

If the attempt to procure abortion has been by means of instruments, the fact must be laid and proved accordingly. The statute also contains the words "other means," and upon these it has been doubted, whether the administering (not of poison or other noxious thing,) but of some other, and innocent substance, with the guilty intent, is within the statute. *Archb. C. L.* 336, 4*th ed.* 1 *Chitt. Burn.* 11. *Matth. Dig.* 3. It seems, however, from the situation in which these words are found in the statute, that they must be intended to include means, *ejusdem generis* as *instruments*, and not as *drugs*.

Procuring abortion when the woman is not quick with child.] By 9 G. 4. c. 31. s. 13. if any person with intent to procure the miscarriage of any woman not being, or not being proved to be then quick with child, unlawfully and maliciously shall administer to her or cause to be taken by her any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court, to be transported for any term not exceeding fourteen years, or to be imprisoned, with or without hard labour, for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment.

The evidence upon an indictment under this part of the section, differs in several respects from that above stated.

1. The intent must be proved as before mentioned.

2. It is not necessary to prove that the woman was *quick with child*, and should it appear that she was so, the prisoner ought to be acquitted upon this indictment. How far it is necessary, in the first instance, for the prosecutor to show that the woman was not with child does not appear to be well settled. Upon an indictment on the similar branch of the repealed statute, 43 G. 3. c. 58. s. 2. where the words are, "if any person, &c. shall administer, &c. to *any woman*, any medicine, &c. with intent to procure the miscarriage of *any woman not being*, or *not being proved to be quick with child*, &c." it was ruled by Lawrence, J. to be immaterial whether the woman was actually with child or not. *Phillips's case*, 3 *Campb.* 76. In a later case however, where it appeared upon the cross-examination of the woman, that she had never been with child at all, *Phillips's case* being cited, Garrow, B. expressed his doubts

as to its authority, but after conferring with Lord Tenterden, left the case to the jury, who found the prisoner guilty. On a case reserved, the judges were of opinion that the conviction was wrong, on the ground that the statute did not apply, *when it appeared negatively* that the woman was not with child. *Scudder's case*, 3 *C. & P.* 605, *Moody's C. C.* 216. It should be observed that the words of the 9 G. 4. differ from those of the 43 G. 3. the former not mentioning "any woman" generally as the latter does, but "any woman not being, or not being proved to be quick with child."

3. The administering or causing to be taken must be proved as already stated.

4. With regard to the nature of the drug, the words used in the two parts of the section differ. In the former part it is "any *poison* or other noxious thing," in the latter, "any medicine, or other thing." Whatever substance, therefore, is administered, if it be with the criminal intent, is within the latter words, and it need not appear that it is either calculated to procure abortion, or is noxious or unwholesome. This was the construction put upon the similar clause in the 43 G. 3. where the words were "any medicine, drug, or other substance or thing whatsoever," upon which Lawrence, J. ruled that it was immaterial whether the drug administered was or was not capable of procuring abortion. *Phillip's case*, 3 *Campb.* 76.

ABDUCTION.

At common law 193
By statute 194
Proof of the taking away or detaining against the will . 194
Proof of the Woman's interest . . . 195
Proof of the motive of lucre . . . 195
Proof of the intent to marry or defile . . 195
Venue 196
Abduction of Girls under sixteen . . . 196
Proof of the taking of the Girl out of the possession of the Father, &c. 196
Proof of the want of consent of the Father, &c. . 197

At common law.] It is stated to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, that act is not indictable at common

law; but if children be taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, (as by intoxication) for the purpose of marrying them, though the parties themselves may be consenting to the marriage, such criminal means will render the act an offence at common law. 1 *East, P. C.* 458, 459. 1 *Russell,* 569. So, seduction may take place under such circumstances of combination and conspiracy, as to render it an indictable offence. *Lord Grey's case,* 3 *St. Tr.* 519. 1 *East, P. C.* 460. 1 *Russ.* 570.

By statute.] The offence of abduction was provided against by statutes 3 H. 7. c. 2., 39 Eliz. c. 9., 4 & 5 P. & M. c. 8, and 1 G. 4. c. 115.; but these statutes are now repealed, and their provisions consolidated in the 9 G. 4. c. 31.

By the 19th section of that statute, it is enacted, that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate; or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Upon an indictment under this statute, the prosecutor must prove—1, the taking away or detaining of the woman against her will—2, that the woman had such an interest as is specified in the statute—3, that the taking away or detaining, was from motives of lucre—4, the intent to marry or defile, &c.

Proof of the taking away or detaining against the will, &c.] The statute 3 H. 7. c. 2., like the statute 9 G. 4., uses the words, "take against her will," and upon those words, it has been held, that getting a woman inveigled out by confederates, and detaining her, and taking her away, is a taking within the statute of H. 7. Thus, where a confederate of the prisoner inveigled a girl of fourteen, having a portion of 5000*l.* to go with her and a maid-servant in a coach into the Park, where the prisoner got into the coach, and the two women got out, and the prisoner detained the girl while the coach took them to his lodgings in the Strand; where, the next morning, he prevailed upon her, by threatening to carry her beyond seas in case she refused, to marry him, (though there was no evidence that she was

deflowered) the prisoner was convicted, and executed. *Brown's case*, 1 *Ventr.* 243. 1 *Russell*, 571. So it is said, that it is no manner of excuse that the woman at first was taken away with her own consent, because, if she afterwards refuses to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be *taken* against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. *Hawk. P. C. b.* 1. *c.* 41. *s.* 7. 1 *East, P. C.* 454. This would probably be now considered as a "detaining" within the statute 9 G. 4. c. 31. See also *Wakefield's case, Murray's Ed.*

Proof of the woman's interest.] The prosecutor must prove that the woman was interested in real or personal estate, according to the allegation in the indictment, or that she was the heiress or next of kin to some one having such interest. Evidence of this fact must be given in the usual way, and possession either of real or personal estate will be *primâ facie* evidence of interest. To prove that the party is heiress, or next of kin, one of the family, or some one acquainted with the family may be called.

Proof that the offence was committed from motives of lucre.] That the party was guilty of the offence from motives of lucre, will in general be gathered from the whole circumstances of the case. Proof that there was little or no previous intercourse between the parties, will tend to establish this part of the case. So, that the offender was in needy circumstances, or that he has made declarations tending to show the object with which he committed the crime. Thus, in *Lockart Gordon's case*, 1 *Russell*, 575, it was proved that the prisoner was pressed for money, and backward in his payments; and that he had admitted to one of the witnesses that he was in distressed circumstances.

Proof of the intent to marry or defile.] Under the statute 3 H. 7, it was necessary that there should be a marriage or defilement, the taking alone not being sufficient; *And.* 115. *Cro. Car.* 486. 1 *Russell*, 571; and it was not necessary to aver an intent to marry or defile; *Fulwood's case, Cro. Car.* 482; nor was it material whether the woman was at last married or defiled with or without her consent, if she were under force at the time of the taking, for such construction was equally within the words and the meaning of the statute, (3 Hen. 7,) which was to protect the weaker sex from both force and fraud. Upon an indictment under the 9 G. 4. c. 31. however, it is not necessary to prove either a marriage or defiling, but only *an intent* to marry or defile, which, like the averment of "motives of lucre,"

will in general appear, from the whole circumstances of the case.

Venue.] Under the statute of 3 Hen. 7. it was held, that where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled with her own consent, the offender was not indictable in either county, on the ground that the offence was not complete in either. *Gordon's case*, 1 *Russ.* 572. This point cannot, however, arise upon the statute 9 G. 4. c. 31. the offence under that statute being complete, by the taking or detaining, with intent, &c. And, moreover, by 7 G. 4. c. 64. s. 12. an offence begun in one county, and completed in another, may be tried in either county.

Abduction of girls under sixteen.] The offence of taking away a maid or woman child unmarried, under the age of sixteen, from the custody of her father, &c., was formerly provided for by statute 4 & 5 P. & M. c. 8. s. 2 & 3. (now repealed) and was likewise, as it seems, an offence at common law. *Hawk. P. C. b.* 1. *c.* 41. *s.* 8. And by statute 9 G. 4. c. 31. s. 20. it is enacted, that if any person shall unlawfully take, or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father and mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment by fine or imprisonment, or by both, as the Court shall award.

Upon an indictment for this offence, the prosecutor must prove—1, the taking of the girl (and that she is under sixteen) out of the possession of the father, &c.; 2, that it was against the will of the father, &c. It will be observed, that neither motives of lucre, nor an intent to marry or defile, are made constituent parts of this offence, as in the preceding section of the act.

Proof of the taking of the girl out of the possession of the father, &c.] It has been held that an illegitimate child is within the protection of the statute 4 & 5 *P.* & *M. Cornforth's case*, 2 *Str.* 1162. *Hawk. P. C. b.* 1. *c.* 41. *s.* 14. And the same would be held under the new statute. The taking away may be effected either by force or fraud, or by obtaining the consent of the girl herself to leave her father, &c. Thus it is said by Herbert C. J., that the statute (of P. & M.) was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement. *Hicks v.*

Gore, 3 *Mod.* 84. So it is no excuse that the defendant being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the girl secretly to elope and marry him, if it appear that it was against the consent of the father. *Twisleton's case*, 1 *Lev.* 257, 1 *Sid.* 387, 2 *Keb.* 432. *Hawk. P. C. b.* 1. *c.* 41. *s.* 10. 1 *Russell*, 579.

Proof of the want of consent of the father, &c.] The prosecutor must prove the want of consent of the father or mother, or other person having the lawful care or charge of the girl. Upon the death of the father, the mother retains her lawful authority over the child, notwithstanding a second marriage, and the consent of the second husband is immaterial. *Ratcliffe's case*, 3 *Rep.* 39. Whether where a girl under sixteen is placed by the father and mother under the temporary care of another, by whose collusion, and with whose consent she is taken away and married, it will be an offence within the statute, does not appear to be well decided. The following case arose upon the statute of Philip and Mary. A widow fearing that her daughter, a rich heiress, might be seduced into an imprudent marriage, placed her under the care of a female friend, (Lady Gore) who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she had attained the age of sixteen, and without the consent of her mother, who was her guardian. It was held by Herbert C. J., that in order to bring the offence within the statute, it must appear that some artifice was used; that the elopement was secret, and the marriage to the disparagement of the family. *Hicks v. Gore*, 3 *Mod.* 84. *Hawk. P. C. b.* 1. *c.* 41. *s.* 11. In this case it is to be noted, says Mr. East, that the mother had placed the child under the care of Lady Gore, by whose procurance the marriage was effected; but nothing is stated in the report to show that the chief justice laid any stress on that circumstance. And in truth, it deserves good consideration before it is decided that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute; for then every schoolmistress might dispose of the children committed to her care, though such delegation of a child for a particular purpose be no delegation of the power of disposing of her in marriage; but the governance of the child in that respect, may still be said to remain in the parent. 1 *East*, *P. C.* 457. There must be a continuous want of consent on the part of the parent, for if the consent be once given, it cannot, it is said, be revoked. *Calthorpe v. Axtell*, 3 *Mod.* 169. *Hawk. P. C. b.* 1. *c.* 41. *s.* 13.

AFFRAY.

An affray is the fighting of two or more persons in some public place, to the terror of the king's subjects; for if the fighting be in private, it is not an assault. 4 *Bl. Com.* 145. *See Timothy v. Simpson,* 1 *C. M. & R.* 757. It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair, or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. *Hawk. P. C. b.* 1. *c.* 65. *s.* 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. *Vide post.* Mere quarrelsome words will not make an affray. 4 *Bl. Com.* 146. 1 *Russell,* 271.

To support a prosecution for an affray, the prosecutor must prove—1, the affray, or fighting, &c.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

ARSON.

Offence at common law . . . 198
Proof of the burning . . . 199
Proof that the house burnt is the house of another 199
Proof of malice and wilfulness . . 201
Offence by statute . . . 201
Proof of the setting fire, &c. . . 202
Proof of the property set fire to . . 203
Proof of the intent to injure or defraud . 206
Setting fire to stacks . . . 207
to ships . . . 208
Negligent burning 209

At common law.] The offence of arson, which is a felony at common law, is defined by Lord Coke to be the malicious

and voluntary burning the house of another, by night or by day. 3 *Inst.* 66. 1 *Hale, P. C.* 566.

Upon an indictment for this offence, the prosecutor must prove—1, the burning; 2, of the house of another; 3, that the offence was committed voluntarily and maliciously.

Proof of the burning.] To constitute arson at common law, it must be proved that there was *an actual* burning of the house, or of some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance, but be put out, or go out of itself. 2 *East, P. C.* 1020. 1 *Hale, P. C.* 569.

The *setting fire* to the house of another, maliciously to burn it, is not a felony, if either by accident or timely prevention, the fire does not take place. 1 *Hale, P. C.* 568.

Where a house has been robbed and burnt, proof that part of the stolen property was found in the possession of the prisoner is evidence to show that he committed the arson. *Rickman's case*, 2 *East, P. C.* 1035. *ante, p.* 58.

Proof that the house, &c. burnt, is the house of another.] It must be *the house* of *another*. The burning of a man's own house is no felony at common law. 1 *Hale, P. C.* 568. 2 *East, P. C.* 1027. But if a man set fire to his own house, maliciously intending thereby to burn the adjoining house, belonging to another, if the latter house is burned, it is felony; if not, it is a great misdemeanor. 1 *Hale, P. C.* 568. 2 *East, P. C.* 1027.

The offence may be committed, not only with regard to a dwelling-house, but also with regard to all outhouses which are parcel of it, though not contiguous, or under the same roof, as in the case of burglary at common law. 1 *Hale, P. C.* 567. And at common law, to burn a barn or outhouse, though not parcel of a dwelling-house, was felony, if it had hay or corn in it. *Id.* The various descriptions of buildings and farming stock are, however, now expressly protected by statute, *vide infra*; and it will not therefore be necessary to examine how far they come within the protection of the common law.

With regard to what constitutes a man's *own house*, it has been held that a tenant for years of a house cannot at common law be guilty of a felony by burning it. *Holmes's case, Cro. Car.* 376. 1 *Hale, P. C.* 568. 2 *East, P. C.* 1023. So a copyholder, although he has surrendered the house by way of mortgage. *Spalding's case*, 1 *East, P. C.* 1025, 1 *Leach*, 218. So a person who is in possession, under an agreement for a lease for three years. The Judges in this case said, that the principle upon which *Holmes's case* (*supra*) was decided was right, and it was the protection of the person in the actual

and immediate possession of the house. *Breeme's case*, 1 *Leach*, 220, 2 *East*, *P. C.* 1026. *See also Pedley's case*, 1 *Leach*, 242.

Upon the same principle, a landlord may be guilty of felony at common law, by burning the house of his tenant. *Foster*, 215. 4 *Bl. Com.* 221. So a woman entitled to dower out of a house in mortgage, the house having been let by her, and the tenant in possession, no dower having been assigned, was held to be guilty of felony in burning the house. *Harris's case*, *Foster*, 113. 2 *East*, *P. C.* 1023. So a pauper put into a house rented from year to year by the overseers, and suffered to live there without paying rent, has no interest, but is merely a servant, and is guilty of felony if he sets fire to the house. The overseers have possession of the house by means of his occupation. *Gowan's case*, 1 *Leach*, 246, (*n.*) 2 *East*, *P. C.* 1027. *Rickman's case*, 2 *East*, *P. C.* 1034.

It requires great nicety, observes Mr. East, (*P. C.* 1034.) to distinguish the person who may be said to occupy *suo jure*, and against whom the offence must be laid to have been committed. In *Glandfield's case*, 2 *East*, *P. C.* 1034, it appeared that the outhouses burned were the property of Blanch Silk, widow, but were only made use of by John Silk, her son, who lived with her after his father's death in the dwelling-house adjoining the outhouses, and took upon him the sole management of the farm with which these outhouses were used, to the loss and profit of which he stood alone, though without any particular agreement between him and his mother. He paid all the servants and purchased all the stock, but the legal property, both in the dwelling-house and in the farm, was in the mother, and she alone repaired the dwelling-house and the outhouses. Heath, J. held, that as to the stable, pound, and hog-sties, which the son alone used, the indictment must lay them in his occupation; that with regard to the brewhouse, (the mother and son both occasionally paying for ingredients, and the beer being used in the family, the mother contributing to the expense,) the same should be laid to be in their joint occupation. The prisoner was indicted accordingly, convicted, and executed.

The house was described in the indictment, 1, as that of Fearne; 2, as that of Davies; 3, as that of the prisoner. It appeared that Fearne occupied part of the house, and let out the rest in lodgings. The room set fire to was let to the prisoner. Two months after the fire he was discharged as an insolvent debtor, and had before executed an assignment, including the house, to Davies. Davies never took possession. Upon a case reserved on the point, whether the possession of the house was rightly described, the Judges held it was so, for the whole house was properly in the possession of Fearne, the possession by his tenants being his possession, and if not, the

prisoner's own room might be described as *his* house. *Ball's case, M.* 1824. *Bayley's MSS.* 1 *Moo. C. C.* 30.

Proof of malice and wilfulness.] It must be proved that the act of burning was both wilful and malicious, otherwise it is only a trespass and no felony. 1 *Hale, P. C.* 569. Therefore if A. shoot unlawfully at the poultry or cattle of B., whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house. *Ibid.* In this case, observes Mr. East, it should seem to be understood, that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences. 2 *East, P. C.* 1019. If A. has a malicious intent to burn the house of B., and in setting fire to it, burns the house of B. and C., or the house of B. escapes by accident, and that of C. only is burnt, though A. did not intend to burn the house of C., yet in law this is a malicious and wilful burning of the house of C., and A. may be indicted accordingly. 1 *Hale, P. C.* 569. 2 *East, P. C.* 1019. So if A. command B. to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house. *Plowd.* 475. 2 *East, P. C.* 1019. So where the primary intention of the offender is only to burn his own house (which is no felony), yet if in fact other houses are thereby burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and the consequence immediately and necessarily flowing from the original act done, it is felony. 2 *East, P. C.* 1031. In a case of this kind, where the prisoner was indicted for a misdemeanor, Buller J. directed an acquittal, on the ground, that as the houses of others had been burned, the offence amounted to felony. *Isaac's case,* 2 *East, P. C.* 1031. *See also Probert's case, Id.* 1030.

By statute.] The various offences of burning houses and other property are now for the most part provided against by various statutes; the evidence upon indictments under which varies in several respects from the evidence under an indictment at common law.

Setting fire to houses, &c.] By stat. 7 & 8 G. 4. c. 30. s. 2. it is enacted, "that if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland duly registered or recorded; or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or to any building or erection used in

carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon."

Upon an indictment on this statute, the prosecutor must prove, 1, The act of setting fire, 2, to the house or other building specified, and, 3, the intent to injure or defraud the party mentioned in the indictment.

Proof of the setting fire, &c.] The act of "setting fire" to the property must be proved. The words "set fire" were used in the stat. 9 G. 1. c. 22., and Mr. East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 *East, P. C.* 1020. And he afterwards remarks, that the actual burning, at common law, and the "setting fire," under the statute, in effect mean the same thing. *Id.* 1033, *ante, p.* 199. The prisoner was indicted (under 9 G. 1.) for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a *setting fire* to the *mill* within the statute. *Taylor's case*, 2 *East, P. C.* 1020, 1 *Leach*, 49.

With regard to the question, how far it is necessary to prove that the prisoner himself set fire to the property with his own hand, Tindal, C. J., in his charge to the grand jury, at Bristol, makes the following remarks: "You will inquire, first, whether the prisoner set fire to the premises himself; in such case no doubt of his guilt can exist; and if the proof falls short of this, you will then consider whether he was jointly engaged in the prosecution of the same object with those who committed the offence. If by his words and gestures he incited others to commit the felony, or if he was so near the spot at the time, that he, by his presence, wilfully aided and assisted them in the perpetration of the crime, in either of these cases the felony is complete, without any actual manual share in its commission." 5 *Car. & P.* 266, (*n.*)

If the indictment alleges that the offence was committed in the night-time, and it appears to have been committed in the day-time, it is no variance. *Minton's case*, 2 *East, P. C.* 1021.

The difficulties which arise in the proof of this offence, are thus noticed by a writer on the criminal law of Scotland: "There is perhaps no crime in which evidence is so difficult as in this, both on account of the secrecy and privacy with which it is usually committed, and the devouring nature of the element raised, which destroys all the usual traces and *indicia* by which in other instances guilt is detected,"—"nevertheless it is

not to be imagined that, on account of this difficulty, the prosecutor is to be considered as relieved from any part of the obligation to make out his case; but only that, in default of direct testimony, which is very seldom to be obtained, a conviction may be legally and safely obtained on circumstantial evidence, if it be only sufficiently weighty. To require direct evidence of the wilful completion of the crime, would be in most, and generally the worst cases, to secure absolute impunity to the criminal.

"Unlike other crimes, the proof of the *corpus delicti* in wilful fire-raising is generally mixed up with that which goes to fix guilt upon the prisoner; nor indeed, in cases where direct evidence cannot be obtained, can it well be otherwise, as the first effect of the flames is to consume the combustibles which raised them. The *indiciæ*, which go to substantiate at once the *corpus delicti* and the guilt of the prisoner, are chiefly that the fire broke out suddenly in an uninhabited house, or in different parts of the same building; that combustibles have been found strewed about or dropped at intervals, or placed in convenient situations to excite combustion; as under beds, under thatch, under a stack, &c.; that the prisoner had a cause of ill-will at the sufferer, or had been heard to threaten him, or had been seen purchasing combustibles, or carrying them in the direction of the premises, or lounging about them at suspicious hours. To this is to be added, where the fire was raised to defraud insurers, the important facts of the premises or its furniture having been insured at a high value, or in different offices at the same time, and of a claim having been made or attempted to be made at both offices." *Alison's Principles of Cr. Law of Scotl.* 444.

Proof of the property set fire to.] The prosecutor must prove that the property set fire to comes within the meaning of the statute, and the description given in the indictment. The word *house* includes, as it seems, all such buildings as would come within that description, upon an indictment for arson at common law. *Vide ante, p.* 199. That includes such buildings as burglary may be committed in at common law; but whether the word would now be held to include all such buildings as burglary may be committed in under the 7 & 8 G. 4. c. 29. s. 13. seems to be doubtful. *See Greenwood's Statutes*, 232, (*n*). A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house*, *outhouse*, or *barn*, within the 9 G. 1. c. 22. It was said that it was not a house in respect of which burglary or arson could be committed; that it was a house intended for residence, but not inhabited, and therefore not a dwelling-house, though intended to be one. That it was not an outhouse, because not parcel of a dwelling-house; and

that it was not a *barn*, within the meaning of that word as used in the statute. *Elsmore v. Inhab. hundred of St. Briavells*, 8 *B. & C.* 461. Upon the construction of the same statute, (9 G. 1. c. 22.) it has been held that a common gaol comes within the meaning of the word *house*. The entrance to the prison was through the dwelling-house of the gaoler, (separated from the prison by a wall,) and the prisoners were sometimes allowed to lie in it. All the judges held that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One of the counts laid it as the house of the corporation, another, of the gaoler, and a third, of the person, whom the gaoler suffered to live in the house. *Donnevan's case*, 2 *East, P. C.* 1020, 2 *W. Bl.* 682, 1 *Leach*, 69. But where a constable hired a cellar (as a lock-up house) under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described, in an indictment for arson, either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon. cor. Hullock B. Lewin, Crown Ca.* 8.

A *cotton* mill was held to be within the meaning of the word mill in the statute 9 G. 1. c. 22. *Anon.* 2 *Stark. Cr. Pl.* 442, (*n.*)

Upon the meaning of the word "outhouse," in the 9 G. 1. the following case was decided. It appeared that the prisoner (who was indicted for setting fire to an outhouse,) had set fire to and burnt part of a building of the prosecutor, situated in the yard at the back of his dwelling-house. The building was four or five feet distant from the house, but not joined to it. The yard was inclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public-house, and was also a flax-dresser. The buildings in question consisted of a stable, and chamber over it, used as a shop for the keeping and dressing flax. It was objected that this was part of the dwelling-house, and not an outhouse; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purposes, this might be part of the dwelling-house, yet that in fact it was *an outhouse*. *North's case*, 2 *East, P. C.* 1022.

The following case was decided upon the words of the same statute. The prisoner was indicted in some counts for setting fire to *an outhouse*, in others to a house. The premises burned consisted of a school-room, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the

whole, were rented of the parish by the prosecutor at a yearly rent. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner, that the building was neither a house nor an outhouse within the 9 G. 1. c. 22.; but the judges were of opinion that it was correctly described either as an outhouse, or part of a dwelling-house within the meaning of the statute. *Winter's case*, *Russ. & Ry. C. C.* 295. 2 *Russell*, 493.

The following case upon the construction of the same word arose upon an indictment under the 7 & 8 G. 4. The place in question stood in an inclosed field, a furlong from the dwelling-house, and not in sight. It had been originally divided into stalls, capable of holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away, and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a waggon might be drawn through it, under cover. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the inclosed and the uninclosed part, and the inhabitants and owners usually called it the cow-stalls. Park, J. did not consider this an outhouse within the statute, but reserved the point for the opinion of the judges: six of the judges were of opinion that this was an outhouse within the statute, but seven of their lordships being of a contrary opinion, a pardon was recommended. *Ellison's case*, 1 *Moody, C. C.* 336. *See also Hilles v. Inhab. of Shrewsbury*, 3 *East*, 457. *Woodward's case*, 1 *Moody, C. C.* 325.

The construction of the word "outhouse" also came into question in the following case. The place burned had been an oven to bake bricks, and stood at a distance from any house, but a door had been put to it with boards and turf over the vent-hole at the top, and a sort of loft-floor had been constructed within. A cow was kept in it; and adjoining, but not under the same roof, was a lean-to, in which a horse was kept, but the latter building was not injured. Upon an indictment for burning this building, describing it as "an outhouse," and secondly, as "a stable," Taunton, J. was of opinion that it was not within the act; that it had been settled from ancient times, that an outhouse must be that which belongs to a dwelling-house, and is in some respect parcel of such dwelling-house. "This building," he said, "is not parcel of any dwelling-house, and does not appear to be connected in any way with the premises of the prosecutor. There is no such word as cowhouse in the statute. The prisoner must be acquitted." *Haughton's case*, 5 *C. & P.* 555.

The house burned should be described as being in the possession of the person who is in the actual occupation, even

though the possession be wrongful. Thus where a labourer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held by the judges, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the labourer. *Wallis's case*, 1 *Moody*, C. C. 344.

Proof of the intent to injure or defraud.] The prosecutor must prove the intent to injure or defraud the party mentioned in the indictment. Upon the proof of the intent of the prisoner, Tindal, C. J. made the following observations in his charge to the grand jury at Bristol. "Where the statute directs, that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and its necessary consequence must injure his neighbour (*vide ante*, *p.* 18.), and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. (*vide ante*, *p.* 201.) No man can shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended." 5 *Car. & P.* 266, (*n.*) Thus where a man was indicted for setting fire to a mill, (43 G. 2. c. 58. s. 1. repealed) with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence that the prisoner was an inoffensive man, and never had any quarrel with the occupier, and that there was no known motive for committing the act, and he was convicted; the judges held the conviction right, for that a party who does an act wilfully, necessarily intends that which must be the consequence of his act. *Farrington's case*, *Russ. & Ry. C. C.* 207. *Philp's case*, 1 *Moody*, *C. C.* 273. *ante*, *p.* 19.

A wife cannot be guilty, under the statute, of setting fire to her husband's house, with intent to injure or defraud him. The judges held such a conviction wrong, thinking that to constitute the offence, there should be an intent to injure or defraud some third person, not one identified with herself. *March's case*, 1 *Moody*, *C. C.* 182.

Where the intent laid is to defraud insurers, the insurance must be proved. To prove this the policy must be produced;

evidence of the books of an insurance company not being admissible, unless the want of the policy is accounted for. *Doran's case*, 1 *Esp.* 127. The policy must be properly stamped. *Gibson's case*, *Russ. & Ry. C. C.* 138, 2 *Leach*, 1007, 1 *Taunt.* 95. *ante*, *p.* 164.

Setting fire to stacks, &c.] By statute 7 & 8 G. 4. c. 30. s. 17, it is enacted that if any person shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, straw, hay, or wood, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing; every such offender shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

The evidence upon an indictment under the above section of the statute will in all material respects resemble that upon an indictment for setting fire to a house, &c. under section 2, *ante*, *p.* 202. Where a man was indicted under statute 9 G. 1. c. 22, which makes it felony to set fire to any cock, mow, or stack of corn, and charged with being accessory to setting fire to "an unthrashed parcel of wheat," this was held not to be an offence within the statute. *Judd's case*, 1 *Leach*, 484, 2 *East*, *P. C.* 1018, 2 *T. R.* 255.

Upon the construction of the word "straw," the following case has occurred. The prisoner was indicted for setting fire to "a stack of straw." It appeared in evidence that the stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of *haulm*, that is, the aftermath or stubble of rye or wheat, about eighteen inches long: according to one witness the straw and *haulm* were mixed. Amongst other objections to the indictment it was urged that this was not a stack of *straw* within the statute, and upon a case reserved for the opinion of the judges, they held all the objections good. The prisoner was afterwards indicted for setting fire to "a stack of straw called *haulm*;" but Vaughan, B. intimated his opinion that it was unsafe to convict on such a count. *Reader's case*, 4 *C. & P.* 245, 1 *Moody*, *C. C.* 239.

It should be observed that in the above case, there was another and fatal objection to the indictment, viz. that it omitted the word "unlawfully," which is used in the statutory description of the offence, and it was therefore unnecessary to decide

the objection as to the description of the stack, though in the report (4 *C. & P.* 245.) it is stated that the judges held the indictment bad upon *all* the objections. In a case which occurred the following year (Reading Spring Assizes, 1831,) the prisoner was charged with setting fire to a *stack of straw*. It appeared that the wheat had been cut and carried, and that the stubble had been mown and made into the rick in question, and this was called by the witnesses a haulm rick. It was objected that this was not a stack of straw within the statute. Patteson, J. said he would not stop the case, as it might be argued that every part of the stalk of the corn when cut was straw, but that if the prisoner was convicted he would reserve the point, as he considered it of great importance that it should be decided whether stacks of this kind were within the act of parliament or not. *Brown's case*, 4 *C. & P.* 553, (*n.*) It is not stated what became of the case.

Where the prisoner was indicted for setting fire to "one stack of barley, of the value of 100*l.*, of R. P. Williams," it was objected that the word "barley" was not mentioned in the statute, and that there was no sufficient averment of the property being in R. P. Williams; but Patteson J. thought that charging the offence as setting fire to a stack of *barley* was sufficient, and also that the averment of the property was sufficient. His lordship stated that if he thought there was any weight in the objection as to the use of the word "barley," he would reserve the point for the opinion of the judges; but the prisoner was afterwards executed. *Swatkins' case*, 4 *C. & P.* 548. So an indictment charging the prisoner with setting fire "to a certain stack of *beans*" is good, for the judges are bound to consider *beans* as a species of pulse. *Woodward's case*, 1 *Moody, C. C.* 323.

The prisoner was indicted for setting fire to a stack of wood. It appeared that between the house of the prosecutor and the next house there was an archway, over which a sort of loft was made, by means of a temporary floor, and that in this place there was an armful of straw and a score of faggots piled on one another. The prisoner set fire to the straw, which was burnt, as well as some of the faggots. Park, J. was clearly of opinion that this was not a stack of wood within the meaning of the act of parliament. *Aris's case*, 6 *C. & P.* 348.

Upon an indictment for setting fire to a stack, a mistake as to the name of the place where the offence was committed is immaterial, the charge being transitory. *Woodward's case*, 1 *Moody, C. C.* 323.

Setting fire to ships.] By statute 7 & 8 G. 4. c. 30. s. 9. it is enacted that if any person shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and

maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

By stat. 12 G. 3. c. 24. s. 1. if any person shall, either within the realm, or in any of the colonies, wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be fired or destroyed, or aid or assist in firing or destroying any of his Majesty's ships or vessels of war, whether afloat or building in any of the King's dock-yards, or building or repairing by contract in any private yard, or any of the King's arsenals, magazines, dock-yards, rope-yards, victualling-offices, or any of the buildings erected therein, or belonging thereto, or any timber or materials placed there for building, repairing, or fitting out of any ships or vessels, or any of the King's military, naval, or victualling stores, or other ammunition of war, or any place where the same or other ammunition of war is, are, or shall be kept, placed, or deposited, every such offender shall be guilty of a capital felony. By sec. 2. persons committing such offences out of the country may be indicted and tried in any county within the realm.

The evidence upon an indictment under 7 & 8 G. 4. c. 30. for setting fire to a ship, will be in all material respects the same as that before detailed, upon an indictment for setting fire to a house, *ante*, *p.* 202.

It has been held that the part owner of a ship may be convicted of setting fire to it with intent to injure the other part owners, although he has insured the whole ship and promised that the other part-owners shall have the benefit of the insurance. *Philps's case*, 1 *Moody*, *C. C.* 263.

Negligent burning.] By statutes 6 Anne, c. 31. and 14 G. 3. c. 78. s. 84. if any menial or other servant, through negligence or carelessness, shall fire or cause to be fired any dwelling-house or otherwise, and be convicted thereof, by oath of one witness before two justices, he shall forfeit 100*l.* to the churchwardens, to be distributed amongst the sufferers by such fire; and if he shall not pay the same immediately on demand of the churchwardens, he shall be committed by the justices to some workhouse, or common gaol, or house of correction, for eighteen months, there to be kept to hard labour.

ASSAULT.

What amounts to an assault . . . 210
What does not amount to an assault . . 211
Accident 211
Amicable contest . . . 212
Lawful chastisement . . . 212
Self-defence 213
Interference to prevent breach of the peace . 213
Defence of possession . . . 214
Execution of process by officers, &c. . . 215
Summary conviction 215

What amounts to an assault.] An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, as by striking at him or even holding up the fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within the reach of it. When the injury is actually inflicted it amounts to a battery, which includes an assault, and this, however small it may be, as by spitting in a man's face or in any way touching him in anger without lawful provocation. 1 *East, P. C.* 406. *B. N. P.* 15. *Hawk. P. C. b.* 1. *c.* 62. *s.* 12. 1 *Russell*, 604. So there may be an assault by exposing a child of tender years, or a person under the control and dominion of the party, to the inclemency of the weather. *Ridley's case*, 2 *Campb.* 650. 1 *Russell*, 605. But a mere omission to do an act cannot be construed into an assault. Thus where a man kept an idiot brother who was bed-ridden, in a dark room in his house, without sufficient warmth or clothing, Burrough, J. ruled that these facts would not support an indictment for assault and false imprisonment; for although there had been negligence, yet mere omission, without a duty, would not create an indictable offence. *Smith's case*, 2 *C. & P.* 449.

If a master take indecent liberties with a female scholar, without her consent, though she do not resist, he will be guilty of a common assault. *Nichol's case, Russ. & Ry.* 130. And where a person professing medicine, desired a young girl who came to him as a patient, to strip naked, and himself took off

her clothes and rubbed her with something from a bottle, he was indicted as for a common assault, and the judge left it to the jury to say whether the prisoner really believed that the stripping her could assist him in curing her; the jury having found that he had no such belief, and that it was wholly unnecessary, he was convicted; and on a case reserved, the judges held that the conviction for a common assault was right. *Rosinski's case*, 1 *Moody, C. C.* 19.

If parish officers cut off the hair of a pauper in the workhouse, with force and against his consent, it is an assault. *Forde v. Skinner*, 4 *C. & P.* 239.

Although to constitute an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately reach him if he were not stopped, and he is stopped, this is an assault. *Stephens v. Myers*, 4 *C. & P.* 349.

It has been frequently said that every imprisonment includes a battery. *B. N. P.* 22. 1 *Selw. N. P. Imprisonment, I.* But this doctrine has been denied. *Emmett v. Lyne*, 1 *N. R.* 255.

In cases of assault, as in all other offences, if several act in concert, encouraging one another and co-operating, they are all equally guilty, though only one commit the actual assault. *Per Bayley, J. Anon. Lewin, C. C.* 17.

What does not amount to an assault.] Although it was formerly doubted, it is now clear that no words, whatever nature they may be of, will constitute an assault. *Hawk. P. C. b.* 1. *c.* 62. *s.* 1. 1 *Bac. Ab. Assault & Battery (A).* 1 *Russell*, 604. But words may qualify what would otherwise be an assault, by showing that the party intends no present corporal injury, as where a person meeting another laid his hand upon his sword saying, "If it were not assize time I would not take such language from you;" for it shows that he had not a design to do the party any corporal hurt. *Turberville v. Savage*, 1 *Mod.* 3, 2 *Keb.* 545.

What does not amount to an assault—Accident.] Where an injury is purely accidental and the party wholly without fault, it will not amount to a battery. *Weaver v. Ward, Hob.* 134. 2 *Roll. Ab.* 548. Thus where the defendant was indicted for throwing down skins in a yard, being a public place, by which a man's eye was beaten out, it appearing that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendant was acquitted. *Gill's case*, 1 *Str.* 190.

But if in the course of an unlawful act a blow is struck, as where two persons are engaged in fighting, and one of them accidentally and unintentionally strikes a third person, this is

not such an accident as will prevent the blow from being a battery. *James v. Campbell*, 5 *C. & P.* 372.

There is a distinction in cases of accident, with regard to the liability of the party, in civil and in criminal proceedings. Thus, it is said by *Hawkins*, that it seems that a man shall not forfeit a recognizance of the peace by a hurt done to another merely through negligence or mischance, as where one soldier hurts another by discharging a gun in exercise without sufficient caution, for notwithstanding such person must in a civil action give the other satisfaction for the damage occasioned by his want of care, yet he seems not to have offended against the purport of such a recognizance, unless he be guilty of some wilful breach of the peace. *Hawk. P. C. b.* 1. *c.* 60. *s.* 27. It is said that it may be deemed a general rule in criminal cases, that the same facts which make killing homicide by misadventure (*vide post*) will be a good defence upon an indictment for a battery. *Archb. Cr. Law*, 347. *5th ed.*

What shall not amount to an assault—Amicable contest.] An injury received in playing at any lawful sport, as cudgels, by consent, will not amount to a battery in law, for the intent of the parties is not unlawful but rather commendable, and tending mutually to promote activity and courage; yet it seems it would be otherwise, if the fighting were with naked swords, because no consent can make so dangerous a diversion lawful. *Hawk. P. C. b.* 1. *c.* 60. *s.* 26. *Com. Dig. Pleader* (3 *M.* 18.) *Bul. N. P.* 15. In an action for assault and battery, where it was insisted as a defence that the plaintiff and defendant fought by consent, Parker, C. B. said that fighting being unlawful, the consent of the plaintiff would be no bar to the action; and he cited a case where Reynolds, C. B. in an action to recover five guineas on a boxing-match, held the consideration illegal. *Boulter v. Clarke*, *B. N. P.* 16. These decisions appear only to apply to *unlawful* games, amongst which boxing and boxing-matches are to be considered. See *post*, as to what shall be deemed lawful sports, title "*Murder.*"

What does not amount to an assault—Lawful chastisement.] If a parent in a reasonable manner chastise his child, or a master his servant, being actually his servant at the time, or a schoolmaster his scholar, or a gaoler his prisoner, or a husband his wife, or if one confine a friend who is mad, and bind and beat him, &c. in such circumstances it is no assault. *Hawk. P. C. b.* 1. c. 30. *s.* 23. *Com. Dig. Pleader* (3 *M.* 13.) A defendant may justify even a *mayhem*, if done by him as an officer of the army for disobedience of orders, and he may give in evidence the sentence of a council of war, upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.

Lane v. Degberg, *B.N. P.* 19. In all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. 1 *East*, *P. C.* 406 ; *and see post*, title " *Murder.*"

What does not amount to an assault—self-defence.] A blow or other violence necessary for the defence of a man's person against the violence of another will not constitute a battery. Thus if A lift up his stick and offer to strike B, it is a sufficient assault to justify B in striking A, for he need not stay till A has actually struck him. *B. N. P.* 18. But every assault will not justify every battery, and it is matter of evidence whether the assault was proportionable to the battery ; an assault may indeed be of such a nature as to justify a *mayhem ;* but where it appeared that A had lifted the form upon which B sat, whereby the latter fell, it was held no justification for B's biting off A's finger. *B. N. P.* 18. In cases of assault, as in other cases of trespass, the party ought not in the first instance to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver v. Bush*, 8 *T. R.* 78, 1 *Russell*, 609. The rule on this point is well laid down by a writer on Scotch Law, "Though fully justified in retaliating, the party must not carry his resentment such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet, or hammer, against a fist, or cane, or in general pushing his advantage, in point of strength, or weapons, to the uttermost. In such cases the defence degenerates into aggression, and the original assailant is entitled to demand punishment for the *new assault* committed on him after his original attack had been duly chastised." *Alison, Princ. Cr. Law of Scot.* 177. 1 *Hume*, 335.

What does not amount to an assault—Interference to prevent breach of the peace, &c.] A man may justify an assault and battery, in preventing the commission of a felony or breach of the peace, or in the suppression of a riot, &c., as if he force a sword from one who offers to kill another therewith, or gently lay his hands upon another, and thereby stay him from inciting a dog against a third person. *Hawk. P. C. b.* 1. *c.* 60. *s.* 23. 1 *Russell*, 608. *Com. Dig. Pleader*, (3 *M.* 16.) *See Timothy v. Simpson*, 1 *C. M. & R.* 757.

Although where there is an actual assault, any one may interfere between the parties to prevent a further breach of the peace, and may justify an assault in so doing, yet a further privilege is given to persons standing in a particular relation. Thus in the case of husband and wife, where the latter is charged with a battery, it is a justification for her that A. B., the person struck, was going to wound her husband, and that she committed the assault to defend him, and prevent A. B.

from beating him. *B. N. P.* 18. 1 *Lord Raym.* 62. So the husband may justify a battery in defence of his wife. In like manner, a child may justify an assault in defence of his parent. *B. N. P.* 18. *Hawk. P. C. b.* 1. *c.* 60. *s.* 23.

Though a servant may justify an assault in defence of his master, yet it has been said that a master cannot justify an assault in defence of his servant, because he may have an action *per quod servitium amisit;* but the servant can have no action for an assault upon his master. *Leward v. Baseley,* 1 *Lord Raym.* 62, 1 *Salk.* 407. *B. N. P.* 18. The reason appears to be an insufficient one, since it would be equally applicable to the case of a husband committing an assault in defence of his wife, for an injury to whom an action *per quod consortium amisit* will lie. *Hawkins,* though he states that there are opinions to the contrary, lays down the rule as including the case of a master committing an assault in defence of his servant. *Hawk. P. C. b.* 1. *c.* 60. *s.* 23, 24. And this also was the opinion of Lord Mansfield, "I cannot say," he observes, "that a master interposing when his servant is assaulted, is not justifiable under the circumstances, as well as a servant interposing for his master. It rests on the relation between master and servant." *Tickel v. Read, Lofft,* 215. 1 *Russell,* 608. A servant cannot, as it seems, justify an assault in defence of his master's son. *Hawk. P. C. b.* 1. *c.* 60. *s.* 24. 1 *Russell,* 609. Nor a tenant in defence of his landlord. *Leward v. Baseley,* 1 *Lord Raym.* 62.

What does not amount to an assault—Defence of possession.] A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. *Hawk. P. C. b.* 1. *c.* 60. *s.* 23. In these cases, unless the trespass is accompanied with violence, the owner of the land will not be justified in assaulting the trespasser in the first instance; but should request him to depart or desist, and if he refuses, should gently lay hands on him for the purpose of removing him, and if he resist with force, then force may be used in return by the owner, sufficient to effect his expulsion. *Weaver v. Bush,* 8 *T. R.* 78, 2 *Roll. Ab.* 548, 1 *East, P. C.* 406. *B. N. P.* 19. But it is otherwise, if the trespasser enter the close with violence, in which case the owner may, without a previous request to depart, use violence in return, in the first instance. *Green v. Goddard, Salk.* 641. *Tullay v. Read,* 1 *C. & P.* 6, *B. N. P.* 19. But by this must be understood a force proportioned to the violence of the trespasser, and only for the purpose of subduing his violence. *See* 1 *Russell,* 609. (*n.*) "A civil trespass," says Holroyd J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so, if a man with force invades and enters into *the dwelling* of

another. But a man is not authorised to fire a pistol on every invasion or intrusion into his house. He ought, if he has a reasonable opportunity, to endeavour to remove the trespasser without having recourse to the last extremity." *Meade's case, Lewin, C. C.* 185. *stated post.* It seems that in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. *Vide, post title, "Manslaughter" and "Murder."*

What does not amount to an assault—execution of process by officers, &c.] A peace officer, or sheriff's officer may justify laying hands upon a party to arrest him. 2 *Roll. Ab.* 546. But a sheriff's officer, in order to justify this, must have a writ or warrant. *Hurrison v. Hodgson*, 10 *B. & C.* 445. A peace officer, like others, must only use the degree of force necessary for the occasion, and will be answerable for the excess; as where a constable had apprehended a boy fighting, and a bystander said, "you ought not to handcuff the boy," upon which the constable gave him a blow with a stick, and took him to the watchhouse; in an action by the party struck, against the constable, it appeared that the plaintiff had placed himself before the defendant for the purpose of preventing him from taking the boy to the watchhouse. Burrough J., said, "there can be no doubt that the constables were right in stopping the fight, and would be justified in apprehending any one who aided or abetted those who fought, but it did not appear that the defendant did either. If they thought that as the defendant was apprehending the boy, the plaintiff placed himself before the defendant to hinder him from doing so, that would justify the defendant in detaining the plaintiff at the watchhouse, but not in beating him; but if the plaintiff only said, "you have no right to handcuff the boy," the defendant was clearly a wrongdoer as to the whole." *Levy v. Edwards*, 1 *C. & P.* 40. So, where one of the marshals of the City of London, whose duty it was on the days of public meetings in the Guildhall, to see that a passage was kept for members of the corporation, directed a person in front of the crowd to stand back, and on being told by him that he could not, for those behind him, struck him immediately on the face, saying that he would make him, it was ruled that in so doing, he exceeded his authority; that he should have confined himself to the use of pressure, and that he should have waited a short time, to afford an opportunity for removing the party in a more peaceable way. *Imason v. Cope*, 5 *C. & P.* 193.

Summary conviction bar to an indictment for assault.] A summary conviction under the stat. 9 G. 4. c. 31. s. 27. is a bar to an indictment for the same assault. By sec. 28, it is enacted, "that if any person against whom any such complaint

shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, (a certificate that the justices deem the offence not to be proved, or to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint) or having been convicted, shall have paid the whole amount adjudged to be paid, or have suffered the punishment awarded for non-payment; in every such case, he shall be released from all further or other proceedings, civil or criminal for the same cause." By sec. 29, it is provided, "that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereon, and shall deal with the case in all respects in the same manner as they would have done before the passing of the act; provided also, that nothing therein contained shall authorise any justice of the peace to hear and determine any case of assault or battery in which any question shall arise, as to the title to any lands, tenements, or hereditaments, or any interest therein, or accruing therefrom, or as to any bankruptcy, insolvency, or any execution under the process of any court of justice."

It seems that where the assault is with intent to commit a felony, it is optional with the justices whether they will convict the offender of a common assault, or direct him to be indicted. Where the charge was of such an assault, and the magistrates proceeded to convict, on an application for a *certiorari* to quash the conviction, Lord Tenterden said that the conviction was for a common assault, and that the act gave the justices a discretionary power to judge whether the charge amounted in substance to more than a common assault. Parke J., observed, that at all events a *certiorari* could hardly be granted, for if the magistrates had no jurisdiction, the conviction was a nullity. *Virgil's case, Lewin, C. C.* 16, (*n.*)

ASSAULTS—AGGRAVATED.

Assaults with intent to commit felony . . 217
On officers endeavouring to save shipwrecked property 217
On officers employed to prevent smuggling . 217
With intent to spoil clothes . . 218
By workmen 219

Under this head are comprised certain assaults, to which, being of an aggravated character, the legislature has attached

additional punishments. Various other enactments of the same nature will be found stated in a subsequent part of this work in connexion with the offence, with intent to commit which, the assault is charged to have been made.

In prosecuting for the offence of an aggravated assault, the statute points out the particular evidence necessary to be given in addition to the common proof of assault.

Assaults with intent to commit felony, &c.] By statute 9 Geo. 4. c. 31. s. 25. it is enacted, that where any person shall be charged with and convicted of any of the following offences as misdemeanors, that is to say, of any assault with intent to commit felony, of any assault upon any peace officer, or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case, the court may sentence the offender to be imprisoned with or without hard labour in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace.

Assaults on officers endeavouring to save shipwrecked property, &c.] By statute 9 Geo. 4. c. 31. s. 24. it is enacted, that if any person shall assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorised, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water; every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

Assaults on officers employed to prevent smuggling.] By stat. 3 & 4 W. 4. c. 53. s. 61. it is enacted, that if any person shall by force or violence assault, resist, oppose, molest, hinder, or obstruct, any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, such person being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of cor-

rection or common gaol, and kept to hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted as aforesaid.

Assault with intent to spoil clothes.] By the 6 Geo. 1. c. 23. s. 11. if any person or persons shall wilfully and maliciously assault any person or persons in the public streets or highways, with an intent to tear, spoil, cut, burn, or deface, and shall tear, spoil, cut, burn, or deface, the garments or clothes of such person or persons, then all and every person and persons so offending, and being thereof lawfully convicted, shall be, and be adjudged to be, guilty of felony; and every such felon and felons shall be subject and liable to the like pains and penalties as in case of felony. This statute is now repealed, but it is mentioned here for the purpose of introducing the following case in which much discussion took place with regard to the proof of intention, a question of great importance in cases of this nature.

The prisoner had frequently accosted Miss A. Porter and her sister Miss Sarah Porter, using very indecent language. Meeting them in St. James's-street, he came behind Miss Sarah Porter, muttered some gross language, and upon her making an exclamation of alarm, struck her a blow on the head. The Miss Porters then ran towards the door of their own house, and while Miss S. Porter was ringing the bell, the prisoner, who had followed them, stooped down, and struck Miss A. Porter with great violence on the hip. The blow was given with some sharp instrument, which tore and cut quite through her clothes, and gave a very severe wound. Buller, J. told the jury, that in order to constitute an offence within the statute, it was necessary, first, that the assault should be made in a public street or highway; 2dly, that it should be made wilfully and maliciously; 3dly, that it should be made with an intent to tear, spoil, cut, &c. the garments or clothes of some person; and 4thly, that the garments or clothes of such person should be actually torn, spoiled, cut, &c. Upon the third point he stated, that if the intent of the prisoner was to cut both the clothes and the person, and in carrying such intent into execution, the clothes alone were cut, it would clearly be within the meaning of the act; or if the intention were to injure the person only, and not to cut the clothes, yet, if in carrying such intention into execution, the assault was made with such an instrument, or under such circumstances, as plainly showed that the execution of the intention to injure the person must unavoidably tear, spoil, cut, &c. the clothes, they might consider whether a person who intends the end, does not also intend the means by which it is to be attained.—The jury found the prisoner guilty, but upon a case reserved, a majority of the judges were of

opinion that the conviction was wrong. They thought that in order to bring a case within the statute, the primary intention ought to be the tearing, spoiling, cutting, &c. of the clothes; whereas in this case, the primary intention of the prisoner appeared to have been the wounding of the person of the prosecutrix. *Williams's case*, 1 *Leach*, 533. 1 *East*, *P. C.* 424. It may be doubted whether the opinion of Buller, J. in this case was not better founded than that of the judges. It appears to be supported by *Cox's case*, *Russ. & Ry.* 362. and *Gillow's case*, 1 *Moody*, *C. C.* 85. stated *post*. The decision of the judges, indeed, in *Williams's case*, proceeded principally upon another point.

Assault by workmen.] By stat. 6 Geo. 4. c. 129. s. 3. if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person, hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent, any journeyman, manufacturer, workman, or other person, not being hired or employed, from hiring himself to, or accepting work or employment from, any person or persons; or if any person or persons shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty on account of not belonging to any club or association, or not having contributed, or refused to contribute, to any common fund, or to pay any fine or penalty; or on account of not having complied, or refused to comply, with any rules, orders, or regulations, made to obtain an advance or reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on trade or business, to make any alteration in his mode of carrying on or conducting such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every one so offending, or aiding, abetting, or assisting therein, shall be imprisoned only, or imprisoned and kept to hard labour, for any period not exceeding three calendar months.

BANKRUPT.

CONCEALING EFFECTS, &c.

Stat. 6 *Geo.* 4. *c.* 16. *s.* 112. . . . 220
Proof of the trading . . . 221
of the petitioning creditor's debt . . 221
of the act of bankruptcy . . . 222
of the commission, or fiat . . . 222
of commissioners' oath . . . 223
of adjudication 223
of notice to Bankrupt . . . 223
of the Gazette 223
of the Bankrupt's examination . . 224
of the concealment, &c. . . . 224
of the value of the effects . . . 225
of the intent to defraud . . . 226

By the 5 Geo. 3. c. 30. the concealing or embezzling of his effects, to the value of 20*l.* by a bankrupt, was made a capital felony; but the punishment was changed to transportation for life by the 1 Geo. 4. c. 115. s. 1. By the 6 Geo. 4. c. 16. the sum is reduced to 10*l.*

By the 112th section of that statute it is enacted, that if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt, shall not, before three of the clock upon the forty-second day, after notice thereof in writing, to be left at the usual place of abode of such person, or personal notice, in case such person be then in prison, and notice given in the London Gazette of the issuing of the commission and of the meetings of the commissioners, surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them from time to time upon oath, or being a Quaker, upon solemn affirmation; or if any such bankrupt, upon such examination, shall not discover all his real or personal estate, and how and to whom, upon what consideration and when, he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expense of his family); or if any such bankrupt shall not, upon such examination, deliver up to the commissioners all such part of

such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife and children,) or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge; or shall be liable to be imprisoned only, or imprisoned and kept to hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

There are four different offences created by this statute:—1. the not surrendering and submitting to be examined; 2. the not discovering all his real and personal estate; 3. the not delivering up to the commissioners all such part of such estate, and all books, &c. as be in his possession, &c.; 4. the removing, concealing, or embezzling part of such estate, to the value of 10*l.* and upwards. All these acts must be "with intent to defraud his creditors."

To support a prosecution against a bankrupt under this statute, for concealment of his effects, the prosecutor must prove—1. the trading; 2. the petitioning creditor's debt; 3. the act of bankruptcy; 4. the commission, or fiat; 5. the oath of the commissioners; 6. the adjudication; 7. the notice to the bankrupt; 8. the notice in the Gazette; 9. the bankrupt's examination; 10. the not disclosing and discovering; 11. the value of the property concealed; and lastly, the intent of the bankrupt to defraud his creditors.

Proof of the trading.] The prosecutor must give strict evidence of all the requisites of bankruptcy. While the commission subsists, its validity may be assumed for certain civil purposes; but where a criminal case occurs, unless the party was a bankrupt, all falls to the ground. *Per Lord Ellenborough, R. v. Punshon*, 3 *Campb.* 97. The trading must therefore be proved in the same manner as in a civil action, by the assignees, where strict evidence of their title is required. *See Rosc. Dig. Ev. N. P.* 457. 3*d ed.*

The prisoner may prove that the trading, in respect of which he has been declared a bankrupt, was a trading by him under age; which will be an answer to the indictment, as no commission can be sustained upon such a trading. *Belton v. Hodges*, 9 *Bingh.* 365.

Proof of the petitioning creditor's debt.] The petitioning creditor's debt must be proved in the same manner as where strict evidence of it is given in a civil action. It will be suffi-

cient, however, to prove an admission of the debt by the prisoner himself. But where in an indictment under the former statute, 5 Geo. 2. c. 30. s. 1. for concealment, the debt was alleged to be due to A. B. and C., surviving executors of the last will and testament of D.; after proof that A. B. and C. were the executors, and were directed by the will to carry on the business, it was proposed to give in evidence an admission by the prisoner, that he was indebted "to the executors," Le Blanc rejected the evidence, it not appearing that C. had assented to the carrying on of the business as trustee under the will. He said that the prisoner might mean that he was indebted to two of the executors only, and that it was going too far to infer that he meant all the three. *Barnes's case*, 1 *Stark.* 243.

Whether a creditor of the bankrupt is a competent witness to prove the petitioning creditor's debt, is a question which does not appear to be well settled. *Vide infra.* Where for this purpose the petitioning creditor was called, Park, J. suggested a doubt as to his competency; but having conferred with Patteson, J. he said he would receive the evidence, subject to further consideration. The debt was, however, proved by other witnesses. *Walters's case*, 5 *C. & P.* 140.

Proof of the act of bankruptcy.] The act of bankruptcy also must be strictly proved, in the same manner as in an action by the assignees.

It was held in one case, that on a prosecution under the 5 Geo. 2. a creditor who had not proved his debt might be called to establish the act of bankruptcy. *Bullock's case*, 2 *Leach*, 996, 1 *Taunt.* 71. But in several civil cases, it has been ruled that a creditor, whether he has proved or not, is not competent to support the commission by proving the act of bankruptcy. *Adams v. Malkin*, 3 *Campb.* 543. *Crooke v. Edwards*, 2 *Stark.* 302. 1 *Deac. Dig. C. L.* 124. *Deac. Bankrupt L. c.* 19. *s.* 7. The bankrupt's wife is an incompetent witness for the prosecution. *Hawk. P. C. b.* 1. *c.* 59. *s.* 4. 1 *Deac. B. L.* 796. *ante*, *p.* 115.

Proof of the commission, or fiat.] The commission, or fiat, is proved by its production, entered of record according to the provisions of the 6 Geo. 4. c. 16. s. 96. the 1 & 2 W. 4. c. 56. and the 2 & 3 W. 4. c. 114. s. 1. By those statutes, the certificate upon the commission, or fiat, purporting to be signed by the person appointed to enter the same of record, or his deputy, is, without any proof of signature, evidence of the instrument having been entered of record.

By the 2 & 3 W. 4. c. 114. s. 8. no fiat issued, or to be issued, in lieu of a commission, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy,

or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the said court of bankruptcy.

In some cases of peculiar hardship, the chancellor has enlarged the time for the bankrupt's making his surrender. *Ex parte Wood*, 1 *Atk.* 221. *Ex parte Lavender*, 1 *Rose*, 55. But this will not be done where the omission of the bankrupt to surrender has been wilful. *Ex parte Roberts*, 2 *Rose*, 378. Though the order will not protect a bankrupt from prosecution, yet it will be considered as a declaration of the chancellor's opinion that the bankrupt had no fraudulent intent in omitting to surrender. *Ex parte Shiles*, 2 *Rose*, 381. 1 *Deac. Dig. Cr. Law*, 122.

But the chancellor may, by superseding the commission altogether, bar the prosecution; and Lord Macclesfield is said to have superseded a commission in more instances than one, where the bankrupt had not surrendered himself, and there did not appear to be any intention of defrauding the creditors. *Ex parte Ricketts*, 6 *Ves.* 445. 1 *Atk.* 222. However, it should seem that the same facts which would be sufficient to induce the chancellor to impede the ordinary course of justice, would also be a good defence to an indictment. *Co. B. L.* 485. 8*th ed.*

Proof of oath of commissioners.] The oath of the commissioners may be proved by the solicitor to the commission, or by any other person present at the time, and by production of the memorial.

Proof of adjudication.] The adjudication must be proved by the production of it, enrolled, and with the certificate of enrolment, in the manner prescribed by the 2 & 3 W. 4. c. 114. s. 8. *ante*, *p.* 222.

Proof of the notice to the bankrupt.] The statute requires the notice to be left at "the usual place of abode" of the bankrupt, or in case he be in prison, personal notice must be given.

Where the notice was to surrender to all the five commissioners (omitting the words, *or the major part of them,*) it was held by the judges, upon a prosecution under the 5 Geo. 2. that the indictment was bad. *Frith's case*, 1 *Leach*, 11.

Proof of the Gazette.] The Gazette is proved by production, without evidence of its having been bought at the Gazette printers or elsewhere. *Forsyth's case*, *Russ. & Ry.* 277. Le Blanc, J. doubted whether an averment of notice in the Gazette was not unnecessary, where the bankrupt had appeared to his commission, and had been examined. *Ibid.*

Proof of the bankrupt's examination.] The bankrupt's examination is proved by its production, and by the evidence of the solicitor to the commission, or other person who was present at the time, and can speak to its having been regularly taken. Parol evidence cannot be given of what the bankrupt said. Thus where, on a prosecution for concealment, the proceedings were put in, and the paper purporting to be the final examination did not contain any questions or answers, but merely stated that the commissioners, not being satisfied with the answers of the bankrupt, adjourned the examination *sine die;* on its being proposed to give parol evidence of what had been said before the commissioners by the bankrupt, Park, J. ruled that he could receive no evidence of the examination but the writing; that the examination was required by the act (6 Geo. 4. c. 16. s. 36.) to be in writing, and that the part of the act which related to the examining by parol, applied only to *questions*, which might be put either by parol or by written interrogatories. *Walters's case*, 5 *C. & P.* 141.

Proof of the concealment, &c.] In order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where the prisoner was indicted under the 5 Geo. 2. c. 30. for not submitting to be examined, and truly disclosing, &c. and the evidence was, that on the last day of examination he appeared before the commissioners, and was sworn and examined, but as to certain parts of his property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of his commission, and the prisoner was convicted, the judges, on a case reserved, held the conviction wrong. *Page's case, Russ. & Ry.* 392; 1 *Brod. & B.* 308.

Where a bankrupt was indicted under the 6 Geo. 4. for not surrendering, and it appeared in evidence that he was in custody under a detainer collusively lodged, it was urged for the prosecution, that though in custody, he was bound to give notice of his situation to the commissioners, in order that they might issue their warrant to bring him before them, or that he ought to have applied for a *habeas corpus*, to enable him to appear before them, or that, at all events, he ought to have applied to the chancellor to enlarge the time for surrender. But Littledale, J. said, that the act was to be construed favourably towards the prisoner, who was not bound to make the application contended for; and that as the commissioners had power to issue their warrant, and by diligent search might discover where he was, the bankrupt was not bound to give them notice. He was also of opinion, that the prisoner was not guilty of felony, though the detainer under which he was in custody was collusive. *Mitchell's case, Lewin, C. C.* 20; 4 *C. & P.* 251.

It is observed by Mr. Cooke (*B. L.* 435. 8*th ed.*), that should the bankrupt be abroad at the time of the commission taken out, and not hear of it till the last day for his surrender is expired, it is impossible to imagine that the act should extend to such a case; and indeed, Lord Hardwicke expresses his opinion (1 *Ves.* 222.) that particular circumstances might amount to a defence upon a criminal prosecution.

The bankrupt is not guilty of a concealment until he has passed his last examination. Until that time he has a *locus penitentiæ*, and although he may previously have concealed the property, he may yet deliver it up before the conclusion of his examination. *Walters's case*, 5 *C. & P.* 138.

If on his examination the bankrupt refer to a document, as containing a full and true discovery of his estate and effects, it is incumbent on the prosecutor to produce that book or to account for its non-production; for otherwise it cannot be known whether the effects have been concealed or not. *Evani's case*, 1 *Moody, C. C.* 70.

It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed, after the issuing of the commission; it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, is the instrument of the concealment. *See Evani's case*, 1 *Moody, C. C.* 74.

The evidence of the concealment, and of the guilty intent with which the act is done, ought to be very satisfactorily made out, but in general it is so clear as to leave little doubt on the point. Concealment of goods in the houses of neighbours or of associates, or in secret places in the bankrupt's own house, or sending them away in the night, endeavouring to escape abroad with part of his effects, &c., constitute the usual proofs in cases of this description. *See Alison, Principles Cr. Law of Scotland*, 571.

It has been held by the court of review, (*Sir J. Cross, diss.*) that a bankrupt who has passed his last examination may be called upon to answer questions touching the concealment of his effects. *In re Smith, Mont. & B.* 203; 2 *Deac. & Chit.* 230. *and see Ex parte Heath, M. & B.* 184; 2 *Deac. & Chit.* 214.

Proof of the value of the effects.] Where the prosecution is on the ground of concealing effects, it must be proved that those effects were of the value of 10*l.*, and where the value is attached to all the articles collectively, as "one table, six chairs, and one carpet, of the value of 10*l.* and upwards," it is necessary to make out the offence as to every one of the articles, for the grand jury have only ascribed the value to all the articles *collectively*. *Forsyth's case, Russ. & Ry.* 274. 2 *Russ.* 251.

Proof of intent to defraud.] Lastly, the prosecutor must prove the intent of the bankrupt to defraud his creditors. This will in general appear from the whole circumstances of the case. Evidence of it may likewise be gathered from the declarations of the prisoner. *Vide ante, p.* 224.

BARRATRY.

A barrator is defined to be a common mover, exciter or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material, whether the courts be of record or not, or whether such quarrels relate to a disputed title or possession, or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow amongst neighbours, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator in respect of any number of false actions brought by him in his own right, unless, as it seems, such actions should be entirely groundless and vexatious, without any manner of colour. Nor is an attorney a barrator, in respect of his maintaining his client in a groundless action, to the commencement of which he was in no way privy. *Hawk. P. C. b.* 1. *c.* 81. *s.* 1, 2, 3, 4. 1 *Russell,* 185.

Barratry is a cumulative offence, and the party must be charged as a *common barrator.* It is therefore insufficient to prove the commission of one act only. *Hawk. P. C. b.* 1. *c.* 81. *s.* 5. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular acts of barratry intended to be insisted on, without which the trial will not be permitted to proceed. *Ibid. s.* 13. The prosecution will be confined by these particulars. *Goddard v. Smith,* 6 *Mod.* 262. The punishment of this offence is fine and imprisonment. *Hawk. P. C. b.* 1. *c.* 81. *s.* 14.

BIGAMY.

Former law and stat. 9 *Geo.* 4. *c.* 31. . . . 227
Proof of the marriages 228
In general 228
Marriages in England 229
By banns 230
By licence—minors 233
Marriages in Scotland 233
Marriages in Ireland 236
Marriages abroad 236
In British factories 239
In British colonies 240
In houses of ambassadors . . . 241
Venue 242
Proof for the prisoner under the exceptions in the Marriage Act 242

Former law, and stat. 9 *G.* 4. *c.* 31.] The offence of bigamy was originally only of ecclesiastical cognizance, but was made a felony by the stat. 1 Jac. 1. c. 11. By the 2d section of that statute, it was provided that the act should not extend to any person or persons whose husband or wife should be continually remaining beyond the seas, by the space of seven years together, or whose husband or wife should absent him or herself, the one from the other, by the space of seven years together, in any parts within his Majesty's dominions; the one of them not knowing the other of them to be living within that time. By section 3, it was provided that the act should not extend to any person or persons that are, or shall be at the time of such marriage divorced by any sentence in the Ecclesiastical Court, or to any person or persons where the former marriage shall be by sentence in the Ecclesiastical Court declared to be void, and of no effect, nor to any person or persons in or by reason of any former marriage, had or made within age of consent.

By the statute 35 G. 3. c. 67. persons guilty of bigamy were made liable to the same punishment as persons convicted of fraud or petit larceny.

By the statute 9 G. 4. c. 31. both the above statutes were repealed, and other provisions substituted in their place.

By that statute, s. 22, it is enacted, that if any person being married, shall marry any other person during the life of the

former husband or wife, whether the second marriage shall have taken place in England or elsewhere; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county. Provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty; or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past; and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such marriage shall have been divorced from the bond of such first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Upon an indictment for bigamy, the prosecutor must prove — 1. the prisoner's first marriage; 2. the prisoner's second marriage; 3. that his first wife was alive at the time of the second marriage; and 4. that the second marriage took place either in the county in which he is tried, or in that in which he was apprehended, or is in custody.

Proof of the marriages—in general.] The prosecutor must prove the two marriages, and it is sufficient if he prove a *voidable* marriage. *Jacob's case*, 1 *Moody, C. C.* 140. *stated post*, 236.

But if either of the marriages, or at all events, the first marriage (*vide post*, p. 231.) be *void*, an indictment for bigamy cannot be sustained. Thus, if a woman marry A., and in the lifetime of A. marry B., and after the death of A., and whilst B. is alive, marry C., she cannot be indicted for bigamy in her marriage with C., because her marriage with B. was a mere nullity. 1 *Hale, P. C.* 693. Although it was formerly held that the marriage of an idiot was valid, yet, according to modern determinations, the marriage of a lunatic, not in a lucid interval, is void. 1 *Bl. Com.* 438, 439. 1 *Russell*, 206. And by stat. 15 G. 2. c. 30. if persons found lunatics under a commission, or committed to the care of trustees by any act of parliament, marry before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, the marriage shall be totally void.

It was held under the former law, that where the second marriage was contracted in Ireland, or abroad, it was not bigamy, on the ground that that marriage which alone consti-

tuted the offence was a fact done in another jurisdiction, and though inquirable here for some purposes, like all transitory acts, was not as a crime cognizable by the rules of the common law. 1 *Hale, P. C.* 692. 1 *East, P. C.* 465. 1 *Russell*, 188. But now by the statute 9 G. 4. c. 31. s. 22. the offence is the same, whether the second marriage shall take place in England or elsewhere.

The identity of the parties named in the indictment must be proved. Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson. Parke J. held the proof to be insufficient, and directed an acquittal. He subsequently expressed a decided opinion that he was right, and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself Hannah Wilkinson*," because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name, and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Drake's case, Lewin, C. C.* 25.

After proof of the first marriage, the second wife is a competent witness, for then it appears that the second marriage was void. *B. N. P.* 287. 1 *East, P. C.* 469. *ante, p.* 114.

The form and validity of marriages will now be considered under the following heads:—marriages in England—marriages in Scotland—marriages in Ireland—marriages abroad—marriages abroad in British factories—marriages abroad in British colonies—marriages abroad in houses of ambassadors.

Proof of the marriages—marriage in England.] Where the marriage has taken place in England, it may be proved by a person who was present at the ceremony, and who can speak to the identity of the parties, and it is not necessary to give evidence either of the registration of the marriage, or of any licence, or of any publication of banns. *Alison's case, Russ. & Ry.* 109. The usual evidence is a copy of the register, with proof of the identity of the parties.

Whether an acknowledgment of his marriage by the prisoner will be sufficient evidence against him in a case of bigamy, does not appear to have been solemnly determined. Some of the judges in *Truman's case*, (1 *East, P. C.* 471. *post, p.* 233.) thought that such an acknowledgment alone was sufficient, and strong reasons were given by them in support of that opinion. "With respect to such evidence," says Mr. East, "it may be difficult to say, that it is not evidence to go to the jury like the

acknowledgment of any other matter *in pais*, where it is made by a party to his own prejudice. But it must be admitted, that it may under circumstances be entitled to little or no weight, for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence, more especially, if made before the second marriage, or upon occasions where in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time." 1 *East, P. C.* 471. These observations have been adopted by Mr. Serjt. Russell. 1 *Russell*, 207, (*n.*)

The marriages of Jews and Quakers are excepted out of the marriage act. Where it was proposed to prove a Jewish marriage by calling witnesses who were present at the ceremony in the synagogue, it was objected that such ceremony was only the ratification of a previous contract in writing, and the contract was accordingly produced and proved. *Horne v. Noel*, 1 *Campb.* 61; *and see Lindo v. Belisario*, 1 *Hagg.* 225, 247, *Appx. p.* 9. *Goldsmid v. Bromer*, *Id.* 324. The marriages of Quakers must be proved to have taken place according to the customs of that sect. 1 *Haggard, Appx. p.* 9. (*n.*) *Deane v. Thomas*, *M. & M.* 361. There is no exception in the marriage act, with regard to the marriage of other Dissenters.

The cases in which the validity of marriages in England has been questioned, on the ground of a noncompliance with the requisitions of the marriage act respecting the publication of banns and licences, will be considered under separate heads.

Proof that the parties were not resident according to the provisions of the act, will not invalidate the marriage, whether it be by banns or licence, for by the 26th sect. of the 4 G. 4. c. 76. it is enacted, that after the solemnization of any marriage, whether by banns or licence, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the parish where the marriage is solemnized; nor shall any evidence in either of such cases be received to prove the contrary. *See Hind's case*, *Russ. & Ry.* 253. *Dobbin v. Cornack*, 2 *Phill.* 104. *Free v. Quin*, *Id.* 14.

Proof of the marriages—marriage in England, by banns.] In what cases a marriage shall be void, is declared by the 22d sect. of the marriage act, 4 G. 4. c. 75. which enacts, that if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel, wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without a publication of banns, or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in the solemnization of such mar-

riage by any person not being in holy orders, the marriage of such persons shall be null and void.

With regard to the chapels in which banns may be lawfully published, it is enacted by the 6 G. 4. c. 92. s. 2. that it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 G. 2. c. 33. and consecrated, in which churches and chapels it has been customary and usual before the passing of that act (6 G. 4.) to solemnize marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By sec. 3. of the last marriage act, 4 G. 4. c. 76. the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorise by writing under his hand and seal the publication of banns, and the solemnization of marriages in such chapels for persons residing in such chapelry or extra-parochial place, and such consent, together with such written authority, shall be registered in the registry of the diocese.

To render a marriage without due publication of banns void, it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. *R. v. Wroxton*, 4 *B. & Ad.* 640. And, therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnization of the marriage, it was held to be a valid marriage. *Id. and see Wiltshire v. Prince*, 3 *Hagg. Ecc. R.* 332.

If the prisoner has been instrumental in procuring the banns of the second marriage to be published in a wrong name, he will not be allowed to take advantage of that objection to invalidate it on an indictment for bigamy. The prisoner was indicted for marrying Anna Timson, his former wife being alive. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the wife was called Anna, and that she was married by that name, but that her real name was Susannah. On a case reserved, the judges held unanimously, that the second marriage was sufficient to constitute the offence, and that after having called the woman Anna in the note, it did not lie in his mouth to say that she was not as well known by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. *Edwards's case, Russ. & Ry.* 283. 1 *Russell*, 201.

This principle was carried still further in a late case before Mr. Baron Gurney. The second wife, who gave evidence on the trial, stated that she was married to the prisoner by the name of Eliza *Thick*, but that her real name was Eliza Browne,

that she had never gone by the name of *Thick*, but had assumed it when the banns were published, in order that her neighbours might not know that she was the person intended. It being objected on behalf of the prisoner that this was not a valid marriage, Gurney, B. said, "that applies only to the first marriage, and I am of opinion that the parties cannot be allowed to evade the punishment for the offence by contracting an invalid marriage." *Penson's case*, 5 *C. & P.* 412. In another case where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved, on a reference to the judges, that the prisoner had been rightly convicted on this evidence. *Palmer's case, coram Bayley, Durham*, 1827, 1 *Deacon's Dig. C. L.* 147.

The following rules laid down by Lord Tenterden in a case upon the construction of the former marriage act, 26 Geo. 2. with regard to the validity of marriages celebrated by banns must be taken subject to the limitation established in *R. v. Wroxton*, 4 *B. & Ad.* 640, *ante p.* 231. If there be a total variation in a name or names, that is, if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, a marriage in pursuance of that publication is invalid, *and it is immaterial whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.* (But now see *R. v. Wroxton, supra.*) But secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used and been known by, at one time and not at another, in such cases the publications may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motives of parties. *R. v. Tibshelf*, 1 *B. & Adol.* 195. A person whose name was *Abraham Langley* was married by banns by the name of *George Smith*; he had been known in the parish where he resided, and was married, by the latter name only, and the Court of King's Bench held that this was a valid marriage under the 26 Geo. 2. *R. v. Billingshurst*, 3 *M. & S.* 250. The distinction between a name assumed for other purposes, and a name assumed for the purpose of practising a fraud upon the marriage laws was clearly pointed out in the following case. A man who had deserted from the army, for the purpose of concealment assumed another name. After a residence of sixteen weeks in the parish he was married by licence in his assumed name, by which only he was known in the place where he resided. Lord Ellenborough said, "If this name had been assumed for the purpose of fraud, in order to enable

the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage act, and the rights of marriage and the court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to become the name which the party has acquired by reputation, that is, within the meaning of the act, the party's real name." The marriage was accordingly held valid within the 26 Geo. 2. *R. v. Burton-upon-Trent*, 3 *M. & S.* 537.

But where the marriage is celebrated in a wrong name for the purpose of carrying into effect a fraud upon the marriage laws, it is void; though, as it has been shown, it would not be so considered with regard to the second marriage upon a prosecution for bigamy, as against the party guilty of the fraud. *Ante p.* 231. Where the banns were published in the name of *William*, the real name being *William Peter*, and the party being known by the name of *Peter*, and the suppression was for the purpose of effecting a clandestine marriage with a minor, without consent, the marriage was declared null and void. *Pouget v. Tomkins*, 1 *Phillimore*, 449. *See also Fellowes v. Stewart*, 2 *Phillimore*, 257, *Middowcrofft v. Gregory*, *Id.* 365. So where the wife at the time of her marriage personated another woman, in whose name banns had been previously published for an intended marriage with the husband. *Stayte v. Farquharson*, 2 *Add.* 282.

Proof of the marriages—marriages in England—by licence—minors.] Under the former marriage act, 26 G. 2., it was held, that if the marriage was by licence, and the prisoner proved that he was a minor at the time, it lay on the prosecutor to show that the consent required by the 11th section of the above act had been obtained, or that otherwise the marriage was void. *Butler's case*, *Russ. & Ry.* 61. *Morton's case*, *Id.* 19, (*n.*) *James's case*, *Id.* 17. *Smith v. Huson*, 1 *Phillimore*, 287. The law on this point has been altered by the new marriage act, 4 G. 4. c. 76. s. 14, which merely requires consent, and has no words making marriages solemnized without such consent *void*. The statute therefore is regarded as *directory* only, and a marriage by a minor without the consent of his father, then living, has been held valid. *R. v. Birmingham*, 8 *B. & C.* 29, 2 *Man. & Ry.* 230. So in the interval between the time of the 3 G. 4. c. 75, (by which the 26 G. 2. was repealed) receiving the royal assent, and the time when it began to operate, a marriage by licence having been solemnized without consent, was held valid. *Waulty's case*, 1 *Moody*, *C. C.* 163.

Proof of the marriages—marriage in Scotland.] A marriage in Scotland, irregular by the laws of that country, subjecting the parties to censures there, is yet regarded as a valid marriage, according to the laws of England. In *Truman's case*,

the following was held to be sufficient evidence of a Scotch marriage. A witness proved that he knew the prisoner, that Mary Russell, his first wife, was still alive; that the prisoner acknowledged he had been married to her in Scotland, and once showed the witness a paper which he said was a certificate of marriage. The prisoner not producing this paper according to notice, a copy of it was proved, with the prisoner's acknowledgment of his own hand-writing to the original. The writing in question purported to be a proceeding before a court in Scotland, reciting an act of *Car.* 2. *parl.* 1. *sess.* 1. *c.* 34, respecting marrying in a clandestine and disorderly manner, and continued thus, "Nevertheless, true it is, I. T. and M. R. were married within three months last past, by some person not authorised by the kirk, and without proclamation of banns, and therefore should be fined in the terms of the act to deter others from committing the like." It then stated a personal warning against the defendants, and was signed "Jno. Truman and Mary Russell," and indorsed by two witnesses. There was then an adjudication of the fine. Upon this evidence, together with due proof of the second marriage, the prisoner was convicted, and a question was reserved for the opinion of the judges, whether the first marriage was legally proved? All the judges present were of opinion, that it was legally proved. It was observed by two of their lordships that the case did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of a copy of a proceeding against him for having improperly contracted the first marriage. But some thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment, and one of them, referring to the case of *Morris v. Miller*, (4 *Burr.* 2059,) observed that there was a distinction between an action for criminal conversation and an indictment for this offence; that in the former the acknowledgment and cohabitation of the plaintiff could not prove his marriage as against the defendant; and the acknowledgment of the defendant in such an action of the plaintiff's marriage might be of a fact not within his own knowledge, as it must be if a defendant in bigamy admitted his own marriage. *Truman's case*, 1 *East, P. C.* 470.

In a very recent publication on the Criminal Law of Scotland, the following observations are made on the subject, whether a marriage irregular, but not *void*, by the Scotch law, is sufficient to support an indictment for bigamy. "The most important question in the law of bigamy is, whether both marriages must be by formal celebration, or whether the charge lies, though one of them, or both have been contracted in that loose and unceremonious manner which is sustained by the law of Scotland. In thoses cases where *both* the matrimonial con-

nexions were of this ambiguous character, there seems to be no doubt that no prosecution for bigamy can lie, and that a second wife who marries either by promise and *copula*, courtship and acknowledgment, or habite and repute, takes her chance of a previous matrimonial connexion having been contracted in the same irregular manner. Where the first marriage has been regular, but the second clandestine, the offending party seems entitled to plead that he truly never did intend to marry at all, but was bent upon a connexion of a different nature, and that the partner of his crime has herself to blame, for not having taken those precautions by proclamation of banns, and otherwise, which the law has provided for that very case. But in the case of *George Story, Dumfries, April* 1824, Lord Justice Clerk Boyle sustained as relevant a charge of bigamy where the second marriage was a clandestine one, solemnized at Annan after the fashion of that place. In regard to the most unfavourable case for a defendant, that of a regular marriage following a clandestine matrimonial connexion, it deserves consideration, that possibly the man did not intend to marry in the first instance, and was entirely ignorant that he had involved himself in its bonds; a situation by no means unlikely to occur when it is recollected how many men under the present law of Scotland do not know whether they are married or not; and how long an investigation is frequently required to enable others to determine the point. So that, as the law cannot sustain a criminal prosecution where the criminal intent is not apparent, it rather appears, though there is no decided case expressly in point, that there are not the requisite materials for a prosecution for bigamy, unless both marriages were formal. In the case of *John Roger, Aberdeen, September*, 1813, it appeared that the defendant had had a connexion with Mary Innes, with whom he had cohabited many years, and had a family. The woman having been brought before the Kirk session, and rebuked for fornication, the defendant, in presence of the minister, admitted that she had yielded in consequence of a promise of marriage on his part, upon which the minister, somewhat rashly, declared them married persons, much against the prisoner's will. They afterwards cohabited as man and wife, as there was a promise and *copula* and marriage by habite and repute, but as the case was of an ambiguous character, the jury under the direction of Lord Gillies, found the defendant not guilty, a verdict evidently implying that a charge of bigamy could not be supported where the first marriage was of this irregular and disputed description. If, however, the first marriage, though clandestine, has gradually assumed the character, and consistence of a regular connexion, and the parties have lived together in that way for a length of time, there seems to be little doubt that a second regular marriage, following such a permanent and acknowledged *status* with another

woman, will expose to the pains of bigamy." *Alison's Princ. Cr. Law of Scot.* 536.

Proof of the marriages—marriage in Ireland.] It seems not to be essential to the validity of a marriage in Ireland that the ceremony should take place in a church. Where it had been performed by a dissenting minister in a private room, the recorder was clearly of opinion that it was valid, on the ground that as before the marriage act a marriage might have been celebrated in England in a house, and it was only necessary by positive law to celebrate it in a church, some law should be shown requiring dissenters to be married in a church; whereas one of the Irish statutes, 21 & 22 G. 3. c. 25. enacts, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, shall be good, without saying at what place they shall be celebrated. *Anon. O. B. coram Sir J. Silvester*, 1 *Russell*, 205. So where a marriage was celebrated at a private house in Ireland by a clergyman of the church of England, the curate of the parish, Best, C. J. held it to be valid. He said, "When I find that this marriage was performed by a gentleman who had officiated as curate of the parish for 18 years, I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant [it was an action in which coverture was pleaded] to the production of a licence or to any further proof. It is true that in a case for bigamy, tried before Mr. Justice Bayley, on the northern circuit, an acquittal was directed because the first marriage, which took place in Ireland, was performed in a private house; but I have reason to know that that learned judge altered his opinion afterwards, and was satisfied of the validity of the first marriage." *Smith v. Maxwell, Ry. & Moo. N. P. C.* 80. The case referred to by Best, C. J. appears to be that of *R. v. Reilly*, 3 *Chetw. Burn*, 726, in which there was no direct evidence that the law of Ireland permitted a marriage to be celebrated at a private house.

Where the first marriage was in Ireland, and it appeared that one of the parties was under age, and no consent of parents was proved, the judges, after referring to the Irish marriage act, 9 G. 2. c. 11. were of opinion that though that act has words to make such a marriage void, yet other parts of the statute show that it is voidable only; and any proceedings to avoid it must be taken within a year, and they therefore held the first marriage binding. *Jacobs' case*, 1 *Moody, C. C.* 140.

Proof of the marriages—marriage abroad.] The general principle with regard to marriages contracted in a foreign country is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation.

If invalid there, it is equally invalid everywhere. *Story on the Conflict of Laws*, 104. citing *Story v. Story*, 2 *Phill. Ecc. Rep.* 332. *Herbert v. Herbert*, 3 *Phill. Ecc. Rep.* 58. *Dalrymple v. Dalrymple*, 2 *Hagg. Cons. Rep.* 54. *Ruding v. Smith*, 2 *Hagg. Cons. Rep.* 390, 391. *Scrimshire v. Scrimshire*, 2 *Hagg. Cons. Rep.* 395. *Ilderton v. Ilderton*, 2 *H. Bl.* 145. *Middleton v. Sauverin*, 2 *Hagg.* 437. *Lacon v. Higgins*, 3 *Stark. N. P. C.* 178. 2 *Kent Com. Lect.* 26. *p.* 91 (2*d ed.*) 2 *Kaims on Eq. b.* 3. *c.* 8. *s.* 1. The most prominent, if not the only exceptions to this rule, are those relating to polygamy and incest: those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves by special circumstances to the benefit of the laws of their own country. *Story on the Conflict of Laws*, 104.

The first exception to the general rule mentioned by Mr. Justice Story is that relating to polygamy and incest. These Christianity is understood to prohibit, and no Christian country, therefore, would recognise polygamy, or an incestuous marriage. But with regard to the latter, he takes a distinction between marriages incestuous by the law of nature, and such as are incestuous by the positive code of a state; and upon this point, he cites a judgment of one of the American courts: "If," say the court, "a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage would not be allowed to have any validity here; but marriages not naturally unlawful, but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be held valid in a state where they are not allowed." *Greenwood v. Curtis*, 6 *Mass. Rep.* 378. "Indeed," continues Mr. Justice Story, "in the diversity of religious opinions in Christian countries, a large space must be allowed for interpretation as to religious duties, rights, and solemnities. In the Catholic countries of continental Europe, there are many prohibitions of marriage which are connected with religious establishments and canons, and in most countries there are positive or customary prohibitions which involve peculiarities of religious opinion or conscientious doubt. It would be most inconvenient to hold all marriages celebrated elsewhere void, where not in scrupulous accordance with local institutions." *Story on the Conflict of Laws*, 107.

In England, however, incestuous marriages are not void, but only voidable, during the lives of the parties; and if not so avoided, are to all intents valid. 1 *Bl. Com.* 434.

With regard to the second exception, the prohibitions depending upon positive law, they apply only in strictness to the subjects of a country. *Story*, 108. An illustration of this may be found in the Civil Code of France, which annuls (art. 174.)

marriages by Frenchmen in foreign countries, who are under incapacity by the laws of France. *Ibid.*

The third exception arises in cases of moral necessity, and has been applied to persons residing in factories, in conquered places, and in desert or barbarous countries, or in countries of an opposite religion, who are permitted to contract marriage there according to the laws of their own country. In short, wherever there is a local necessity, from the absence of laws, or the presence of prohibitions or obstructions not binding upon other countries, or from peculiarities of religious opinion and conscientious scruple, or from circumstances of exemption from local jurisdiction, marriages will be allowed to be valid according to the law of the native domicil. *Ibid, citing Ruding v. Smith,* 2 *Hagg. Cons. R.* 371. 384, 385, 386. *Lautour v. Teesdale,* 8 *Taunt.* 830, 2 *Marsh.* 243. *R. v. Inhabitants of Brampton,* 10 *East,* 282.

Although it is an established rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else, yet it has not been *e converso* established that marriages of British subjects, not good according to the law of the place where celebrated, are universally and under all possible circumstances to be regarded as invalid in England. It is certainly the safest course to be married according to the law of the country, for then no question can be raised ; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. *Per Lord Stowell, Ruding v. Smith,* 2 *Hagg. Cons. Rep.* 371.

In proving a marriage abroad, it must appear that the ceremony performed was the marriage ceremony according to the foreign law. Thus where, on an indictment for bigamy, before the 26 Geo. 2. it appeared that the first marriage, which was with a Roman Catholic woman in England, was performed by a Catholic priest, not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witnesses not understanding, could not swear even that the ceremony according to the church of Rome was read, the defendant was directed to be acquitted. *Lyon's case, O. B.* 1 *East, P. C.* 469.

In proving a marriage which has taken place abroad, evidence must be given of the law of the foreign state, in order to show its validity. For this purpose, a person skilled in the laws of the country should be called. *Lindo v. Belisario,* 2 *Hagg.* 248. *Middleton v. Janvers,* 2 *Hagg.* 441. But *see Horford v. Morris,* 2 *Hagg.* 431. Where evidence of the law of Scotland was required, the testimony of a witness who was a tobacconist was rejected. *Anon. cited* 10 *East,* 287.

Some obscurity appears to exist with regard to the mode of

proving foreign laws in English courts. The rule, as at present understood, appears to be, that the written law of a foreign state must be proved by a copy duly authenticated. *Clegg v. Levy*, 3 *Camph.* 166. With regard to the mode of authenticating it, the following case has occurred. In order to prove the law of France respecting marriage, the French vice-consul was called, who produced a copy of the *Cinq Codes*, which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government. *Sir Thomas Picton's case*, 30 *How. St. Tr.* 514. was referred to as an authority in favour of admitting this evidence, but it appears that there the evidence was received by consent. 30 *St. Tr.* 494. Abbott, J. said that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but according to his recollection, printed books on the subject of the law of Spain were referred to and acted on in argument in *Sir T. Picton's case*, as evidence of the law of that country, and therefore he should act on that authority, and receive the evidence. *Lacon v. Higgins, Dowl. & Ry. N. P. C.* 38, 3 *Stark.* 178.

The practice with regard to the proof of foreign laws in the United States is as follows:—The usual modes of authenticating foreign laws there, are by an exemplification under the great seal of a state; or by a copy proved to be a true copy; or by the certificate of an officer authorised by law, which certificate itself must be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath; sometimes, however, certificates of persons in high authority have been allowed as evidence. *Story on the Conflict of Laws*, 530.

Proof of the marriages—marriage abroad in British factories.] On the subject of the mode of performing marriages in British factories abroad, Lord Stowell has made the following observations. "What is the law of marriage in all foreign establishments, settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the East, Smyrna, Aleppo, and others, in all of which (some of these establishments existing under authority, by treaties, and others under indulgence and toleration,) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburgh does not look to the ritual of the Greek church, but to the rubric of the church of England, when he contracts a marriage with an English woman. Nobody can suppose that, whilst the Mogul empire

existed, an Englishman was bound to consult the *Koran* for the celebration of his marriage. Even where no foreign connexion can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey, is left to depend, I presume, upon their own canons, without any reference to Mahomedan ceremonies. There is a *jus gentium* upon this matter, an amity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in their transactions of marriage. It may be difficult to say, *à priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong. (*See Portreis v. Tondeur*, 1 *Hagg. Cons. R.* 136., *and now, stat.* 4 *G.* 4. *c.* 91. *s.* 2.) I am not aware of any judicial determination on this point, but the reputation which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question were brought to judgment." *Ruding v. Smith*, 2 *Hagg. Cons. R.* 371.

The validity of marriages celebrated in the chapel of any British factory abroad, or in the house of any British subject residing at such factory, is recognized by the statute 4 Geo. 4. c. 91. s. 2. (*stated post, p.* 241.)

Proof of the marriages—marriage in British colony.] What form of celebration will confer validity on a marriage in a British colony, must depend upon the peculiar circumstances of the case. This question came before Lord Stowell in a case in which the validity of a marriage, celebrated at the Cape of Good Hope, between English subjects, by a chaplain of the British forces, then occupying that settlement under a capitulation recently made, was brought before him for his decision. After some observations (which have already been cited, *ante, p.* 239,) he held the marriage valid, on the ground of the distinct British character of the parties, on their independence of the Dutch law, on their own British transactions, on the insuperable obstacles of obtaining any marriage conformable to the Dutch law, on the countenance given by British authority and British administration to this transaction, and on the whole country being under British dominion. *Ruding v. Smith*, 2 *Hagg. Cons. Rep.* 371., *Story, Conflict of Laws*, 111.

A similar question arose in a case before the court of King's Bench, respecting the legitimacy of a pauper. A soldier on service with the British army in St. Domingo, being desirous of marrying the widow of another soldier, who had died there, the parties went to a chapel in the town, and the ceremony

was there performed by a person appearing and officiating as a priest, the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the pauper to be the marriage service of the church of England. After eleven years' cohabitation, this was held to be sufficient evidence that the marriage was properly celebrated, although the pauper (the wife) stated that she did not know that the party officiating was a priest. Lord Ellenborough considered the case, first, as a marriage celebrated in a place where the law of England prevailed, (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them,) and held that it would be a good marriage by that law; for it would have been a good marriage in this country before the marriage act, and consequently would be so now in a foreign colony to which that act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular, and held that the facts stated would be evidence of a good marriage according to the law of the country, whatever it might be, and that upon such facts every presumption was to be made in favour of the validity of the marriage. *R. v. Brampton*, 10 *East*, 282.

So a marriage between two British subjects at Madras, celebrated by a Catholic priest, not conformably to the laws of the natives of India, nor with the licence of the governor, which it had been the uniform custom to obtain, was held valid. *Lautour v. Teesdale*, 8 *Taunt.* 833, 2 *Marsh.* 243.

Proof of marriages—abroad—in houses of ambassadors, &c.] It appears that before the passing of the statute 4 Geo. 4. c. 91. a marriage celebrated in the house of an English ambassador abroad, was held valid. *R. v. Brampton*, 10 *East*, 286. *Ruding v. Smith*, 2 *Hagg. Cons. Rep.* 371. And now, by the 2d section of that statute, reciting that it is expedient to relieve the minds of all his majesty's subjects from any doubt of the validity of marriages, solemnized by a minister of the church of England in the chapel or house of any British ambassador, or minister residing within the country, to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad; it is enacted that all such marriages shall be deemed and held to be

as valid in law, as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law. And it is provided that the act shall not confirm, or impair, or affect the validity of any marriage solemnized beyond the seas, save and except such as are solemnized as therein specified and recited.

Marriages in Newfoundland are regulated by the statute 5 Geo. 4. c. 68. repealing the 57 Geo. 3. c. 51.

Venue.] The stat. 9 Geo. 4., like that of 1 Jac. 1., enacts that the prisoner may be tried in the county in which he is apprehended. Upon the latter statute, it was held that the prisoner, having been apprehended for larceny in the county of W., and a true bill having been found against him while in custody under that charge, for bigamy, he might be tried for the latter offence in the county of W. *Jordan's case, Russ. & Ry.* 48. The second marriage was at Manchester, and a warrant was issued by a magistrate there to apprehend the prisoner. He, having removed to London, surrendered to one of the police magistrates there, who admitted him to bail. On his trial at the Old Bailey, the court, on an objection taken by his counsel, were of opinion, that as *the warrant* had not been produced, and as it had not been proved that the prisoner was *apprehended* in the county of Middlesex, the court had no jurisdiction to try him. *Forsyth's case*, 2 *Leach*, 826.. But now, by stat. 9 Geo. 4. the prisoner may be tried in the county in which he is *in custody*.

Proof for the prisoner under the exceptions.] The prisoner may prove under the first exception in the statute 9 Geo. 4. that he is not a subject of his majesty, and that the second marriage was contracted out of England.

Secondly, he may prove that his wife has been continually absent from home for the space of seven years last past, and was not known by him to be living within that time. There is no exception as in the 1 Jac. 1. with regard to persons "continually remaining beyond the seas for the space of seven years together." That statute, like the 9 Geo. 4. contained an exception, exempting persons absent, without knowledge by the other party of their being alive. The question whether a prisoner setting up this defence ought to show that he has used reasonable diligence to inform himself of the fact, and whether, if he neglects the palpable means of availing himself of such information, he will stand excused, does not appear to be decided. 1 *East, P. C.* 467, 1 *Russell*, 189.

The third exception is where the party, at the time of the second marriage, has been divorced from the bond of the first marriage. The words of the 1 Jac. 1. were, "divorced by

the sentence of any ecclesiastical court," and were held to extend to a divorce *à mensâ et thoro.* 1 *Hale, P. C.* 694. 4 *Bl. Com.* 164. 1 *East, P. C.* 467. But now a divorce *à vinculo matrimonii* must be proved. It is not sufficient to prove a divorce out of England, where the first marriage was in this country. The prisoner was indicted for bigamy under the 1 Jac. 1. It appeared that he had been married in England, and that he went to Scotland, and procured there a divorce *à vinculo matrimonii*, on the ground of adultery, before his second marriage. This, it was insisted for the prisoner, was a good defence under the third exception in the statute 1 Jac. 1.; but on a case reserved, the judges were unanimously of opinion that no sentence or act of any foreign country could dissolve an English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England, and that no divorce of an ecclesiastical court was within the exception in s. 3. of 1 Jac. 1. unless it was the divorce of a court within the limits to which the 1 Jac. 1. extended. *Lolley's case, Russ. & Ry.* 237.

The fourth exception is where the former marriage has been declared void by the sentence of any court of competent jurisdiction. The words in the statute of 1 Jac. 1. were, "by sentence in the ecclesiastical court;" and under these, it was held that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the counsel for the crown from proving the marriage, the sentence having decided on the validity of the marriage only collaterally, and not directly. *Duchess of Kingston's case*, 11 *St. Tr.* 262. *fo. ed.* 20 *How. St. Tr.* 355, 1 *Leach*, 146.

The 9 Geo. 4., unlike the 1 Jac. 1., contains no exception with regard to cases where the first marriage was within the legal age of consent, that is, fourteen in a male, and twelve in a female. 1 *Bl. Com.* 436. *Gordon's case, Russ. & Ry.* 48. It has been observed, that notwithstanding this omission, no judge, probably, would direct a jury to find a party guilty of bigamy, where the first marriage was within that age, and not followed up by any subsequent agreement or cohabitation, after the parties had attained that age. 1 *Deac. Dig. C. L.* 143.

BRIBERY.

Nature of the offence.] Bribery is a misdemeanor punishable at common law. Bribery in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place, taking any

valuable thing except meat and drink of small value of any man who has to do before him in any way, for doing his office, or by colour of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also bribery sometimes signifies the taking or giving a reward for offices of a public nature. *Hawk. P. C. b.* 1. *c.* 67. *s.* 1, 2, 3.

An attempt to bribe is a misdemeanor, as much as the act of successful bribery, as where a bribe is offered to a judge, and refused by him. 3 *Inst.* 147. So it has been held, that an attempt to bribe a cabinet minister for the purpose of procuring an office, is a misdemeanor. *Vaughan's case,* 4 *Burr.* 2494. So an attempt to bribe, in the case of an election to a corporate office, is punishable. *Plympton's case,* 2 *Ld. Raym.* 1377.

Bribery at elections for members of parliament.] Bribery at elections for members of parliament, is an offence at common law, punishable by indictment or information, and the statute 2 G. 2. c. 24. which imposes a penalty upon such offence, does not affect that mode of proceeding. *Pitt's case,* 3 *Burr.* 1339, 1 *W. Bl.* 380. Where money is given it is bribery, although the party giving it take a note from the voter, giving a counter note, to deliver up the first note when the elector has voted. *Sulston v. Norton,* 3 *Burr.* 1235, 1 *W. Bl.* 317. So also a wager with a voter, that he will not vote for a particular person. *Loft,* 552. *Hawk. P. C. b.* 1. *c.* 67. *s.* 10. (*n.*)

BRIDGES.

Indictment for not repairing 245
Proof of bridge being a public bridge . . 245
Highway at each end . . . 247
Proof of the bridge being out of repair . . 247
Proof of the liability of the defendants—at common law 247
New bridges . . . 248
Public companies 249
Individuals—ratione tenuræ . . . 250
Proof in defence—by counties . . . 250
By minor districts or individuals . . 251
By corporation 251
Venue and trial 251
Competency of witnesses 251
Indictment for maliciously pulling down bridges . 251

Indictment for not repairing.] Upon an indictment for a nuisance to a public bridge, whether by obstructing or neglecting to repair it, the prosecutor must prove, first, that the bridge in question is a public bridge; and secondly, that it has been obstructed or permitted to be out of repair, and in the latter case, the liability of the defendants to repair.

Proof of the bridge being a public bridge.] A public bridge may be defined to be such a bridge as all his Majesty's subjects have used freely, and without interruption, as of right, for a period of time competent to protect themselves, and all who should thereafter use them, from being considered as wrong doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use may be questioned. *Per Lord Ellenborough, R. v. Inhab. of Bucks,* 12 *East,* 204. With regard to bridges newly erected, the general rule is, that if a man builds a bridge, and it becomes useful to the county in general, it shall be deemed a public bridge, and the county shall repair it. But where a man builds a bridge for his own private benefit, although the public may occasionally participate with him in the use of it, yet it does not become a public bridge. *R. v. Inhab. of Bucks,* 12 *East,* 203, 204. Though it is otherwise, if the public have constantly used the bridge, and treated it as a

public bridge. *R. v. Inhab. of Glamorgan*, 2 *East*, 356. (*n.*) Where a miller, on deepening a ford, through which there was a public highway, built a bridge over it, which the public used, it was held that the county was bound to repair. *R. v. Inhab. of Kent*, 2 *M. & S.* 513.

A question has sometimes arisen whether arches adjacent to a bridge, and under which there is a passage for water in times of flood, are to be considered either as forming part of the bridge, or as being themselves independent bridges. Where arches of this kind existed, more than 300 feet from a bridge, on an indictment against the county for non-repair of them, and a case reserved, the Court of King's Bench held that the county was not liable. *R. v. Inhab. of Oxfordshire*, 1 *Barn. & Ad.* 297, (*n.*) *Second indictment, Id.* 289. The rule laid down by Lord Tenterden C. J. in the latter case was, that the inhabitants of a county are bound, by common law, to repair bridges erected over such water only as answers the description of *flumen vel cursus aquæ*, that is, *water flowing in a channel between banks more or less defined*, although such channel may be occasionally dry.

In the following case, a question arose whether a bridge for foot-passengers which had been built adjoining to an old bridge for carriages, was parcel of the latter. The carriage-bridge had been built before 1119, and certain abbey lands were charged with the repairs. The proprietors of those lands had always repaired the bridge so built. In 1765, the trustees of a turnpike-road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brick work and iron pins, and partly resting on the stone-work of the bridge. It was held that the foot-bridge was not parcel of the old carriage-bridge, but a distinct structure, and that the county was bound to repair it. *R. v. Inhab. of Middlesex*, 3 *B. & Ad.* 201.

Where the trustees under a turnpike act build a bridge across a stream, where a culvert would be sufficient; yet, if the bridge become upon the whole more convenient to the public, the county cannot refuse to repair it. *R. v. Inhab. of Lancashire*, 2 *B. & Ad.* 813.

The public may enjoy a limited right only of passing over a bridge, as where a bridge was used at all times by the public, on foot, and with horses, but only occasionally with carriages, viz., when the ford below was unsafe to pass, and the bridge was sometimes barred against carriages by means of posts and a chain, it was held that this was a public bridge, with a right of passage limited in extent, yet absolute in right. *R. v. Inhab. of Northampton*, 2 *M. & S.* 262. A bar across a public bridge locked, except in times of flood, has been ruled to be conclusive evidence that the public have only a limited right to

use the bridge at such times, and it is a variance to state, that they have a right to use it "at their free will and pleasure." *R. v. Marquis of Buckingham*, 4 *Campb.* 189. But where a bridge passed over a ford, and was only used by the public in times of floods, which rendered the ford impassable, yet, as it was at all times open to the public, Abbott C. J., ruled that the county was bound to repair. *R. v. Inhab. of Devon, Ry. & Moo. N. P. C.* 144.

Proof of the bridge being a public bridge—highway at each end.] At common law the county is bound *primâ facie* to repair the highway at each end of a public bridge, and by the statute 22 Hen. 8. c. 5. the length of the highway to be thus repaired is fixed at 300 feet. If indicted for the non-repair of such portion of the highway, they can only excuse themselves by pleading specially, as in the case of the bridge itself, that some other person is bound to repair by prescription, or by tenure. *R. v. Inhab. of West Riding of Yorkshire*, 7 *East*, 588, 5 *Taunt.* 284. *S. C. in House of Lords.*

The inhabitants of Devon erected a new bridge within 300 feet next adjoining to an old bridge in the county of Dorset; which 300 feet the county of Dorset was bound to repair. It was held, nevertheless, that Devon was bound to repair the new bridge, which was a distinct bridge, and not to be considered as an appendage to the old bridge. *R. v. Inhab. of Devon*, 14 *East*, 477.

Proof of the bridge being out of repair.] The county is only chargeable with *repairs*, and cannot be indicted for not widening or enlarging a public bridge, which has become from its narrowness inconvenient to the public. Not being bound to make a new bridge, the county is not bound to enlarge an old one which is, *pro tanto*, the erection of a new bridge. *R. v. Inhab. of Devon*, 4 *B. & C.* 670.

Those who are bound to repair bridges must make them of such height and strength, as may be answerable to the course of the water, whether it continue in the old channel or make a new one. *Hawk. P. C. b.* 1. *c.* 77. *s.* 1.

Proof of the liability of the defendants—by the common law.] All public bridges are *primâ facie* repairable, at common law, by the inhabitants of the county, and it lies upon them if the fact be so, to show that others are bound to repair. *R. v. Inhab. of Salop*, 13 *East*, 95. 2 *Inst.* 700, 701. *R. v. Inhab. of Oxfordshire*, 4 *B. & C.* 196. But a parish or township, or other known portion of a county may, by usage and custom, be chargeable to the repair of a bridge erected in it. *Per Cur. R. v. Ecclesfield*, 1 *B. & A.* 359. So where it is within a franchise. *Hawk. P. C. b.* 1. *c.* 77. *s.* 1. The charge may be cast upon a corpora-

tion aggregate, either in respect of the tenure of certain lands, or of a special prescription, and in the same manner, it may be cast upon an individual, *ratione tenuræ*. *Id.* Where an individual is so liable, his tenant for years in possession is under the same obligation. *Reg. v. Bucknall*, 2 *Ld. Raym.* 792. Any particular inhabitant of a county, or any of several tenants of lands charged with such repairs, may be indicted singly for not repairing, and shall have contribution from the others. *Hawk. P. C. b.* 1. *c.* 77. *s.* 3. 2 *Lord Raym.* 792. The inhabitants of a district cannot be charged *ratione tenuræ*, because they cannot, as such, hold lands. *R. v. Machynlleth*, 2 *B. & C.* 166. But a parish, as a district, may, at common law, be liable to repair a bridge, and may therefore be indicted for the not repairing, without stating any other ground of liability than immemorial usage. *R. v. Inhab. of Hendon*, 4 *B. & Ad.* 628.

The liability of a county to the repairs of a bridge, is not affected by an act of parliament imposing tolls, and directing the trustees to lay them out in repairing the bridge. This point arose, but was not directly decided in the case of *R. v. Inhab. of Oxfordshire*, 4 *B. & C.* 194, the plea in that case not averring that the trustees had funds; but Bayley J., observed, that even then a valid defence would not have been made out, for the public had a right to call upon the inhabitants of the county to repair, and *they* might look to the trustees under the act. With regard to highways, it has been decided that tolls are in such cases only an auxiliary fund, and that the parish is primarily liable. (*See post, Highways.*) And as the liability of a county resembles that of a parish, these decisions may be considered as authorities with regard to the former.

Proof of the liability of the defendants—by the common law—new bridges.] Although a private individual cannot by erecting a bridge, the use of which is not beneficial to the public, throw upon the county the *onus* of repairing it, yet if it become useful to the county in general, the county is bound to repair it. *Glasburne Bridge case*, 5 *Burr.* 2594. Thus, where, to an indictment for not repairing a public bridge, the defendants pleaded that H. M. being seized of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge, and that he and his tenants enjoyed a way over the bridge for their private benefit and advantage, and that, therefore, he ought to repair; and on the trial the statements in the plea were proved, but it also appeared that the public had constantly used the bridge from the time of its being built; Lord Kenyon directed the jury to find a verdict for the crown, which was not disturbed. *R. v. Inhab. of Glamorgan*, 2 *East*, 356. (*n.*)

Where a new bridge is built, the acquiescence of the public will be evidence that it is of public utility. As, to charge the

county, the bridge must be made on a highway, and as, while the bridge is making, there must be an obstruction of the highway, the forbearing to prosecute the parties for such obstruction, is an acquiescence by the county in the building of the bridge. *See R. v. Inhab. of St. Benedict*, 4 *B. & A.* 450. The evidence of user of a *bridge* by the public, differs from the evidence of user of a highway, for as a bridge is built on a highway, the public using the latter must necessarily use the former, and the proof of adoption can hardly be said to arise, but the user is evidence of acquiescence, as showing that the public have not found or treated the bridge as a nuisance. *See R. v. Inhab. of West Riding of Yorkshire*, 2 *East*, 342. Where a bridge is erected under the authority of an act of parliament, it cannot be supposed to be erected for other purposes than the public utility. *Per Lawrence J., R. v. Inhab. of West Riding of Yorkshire*, 2 *East*, 352. If a bridge be built in a slight or incommodious manner, it cannot be imposed as as burthen on the county, but may be treated altogether as a nuisance, and indicted as such. *Per Lord Ellenborough, Ibid.*

And by statute 43 G. 3. c. 59. s. 5. no bridge to be thereafter erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction of the county surveyor, or person appointed by the justices of the peace, at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions.

The words of this act comprehend every kind of person by whom, or at whose expense a bridge shall be built. Trustees appointed under a local turnpike act are "individuals" or "private persons" within the statute, and therefore a bridge erected by such trustees after the passing of the act, and not under the direction of the county surveyor, is not a bridge which the county is bound to repair. *R. v. Inhab. of Derby*, 3 *B. & Ad.* 147.

Where the wood-work of a bridge was washed away, leaving the stone abutments, and the parish repaired the bridge, partly with the old wood and partly with new, this was held not to be a bridge "erected or built" within the above statute, but an old bridge repaired, and the county was held liable. *R. v. Inhab. of Devon*, 5 *B. & Ad.* 383.

Proof of the liability of the defendants—public companies.] In some cases where public companies have been authorised by the legislature to erect or alter bridges, a condition has been implied that they shall keep such bridges in repair. The pro-

prietors of the navigation of the river Medway were by their act empowered to alter or amend such bridges and highways as might hinder the navigation; *leaving them, or others as convenient, in their room.* Having deepened a ford in the Medway, the company built a bridge in its place, which being washed away, they were held bound to rebuild. Lord Ellenborough said that the condition to repair was a continuing condition, and that the company having taken away the ford, were bound to give another passage over the bridge, and to keep it in repair. *R. v. Inhab. of Kent*, 13 *East*, 220. The same point was ruled in the case of *the King v. the Inhabitants of the parts of Lindsey*, (14 *East*, 317.) in which the company had made a cut through a highway, and built a bridge over it. An act of parliament empowered the commissioners for making navigable the river Waveney, to cut, &c., but was silent as to making bridges. The commissioners having cut through a highway, and rendered it impassable, a bridge was built over the cut, along which the public passed, and the bridge was repaired by the proprietors. Being out of repair, the proprietor of the navigation was held liable to the repairs. The court said that the cut was made not for public purposes, but for private benefit; and the county could not be called upon to repair, for it was of no advantage to them to have a bridge instead of solid ground. *R. v. Kerrison*, 3 *M. & S.* 326. *See also R. v. Inhab. of Somerset*, 16 *East*, 305.

Proof of liability—defendants, individuals.] *Ratione tenuræ* implies immemoriality. 2 *Saund.* 158. *d.* (*n.*) And, therefore, upon an indictment against an individual for not repairing, by reason of the tenure of a mill, if it appear that the mill was built within the time of legal memory, the defendant must be acquitted. *Hayman's case, Moo. & M.* 401.

Any act of repairing on the part of an individual, is *primâ facie* evidence of his liability. Thus, it is said, that if a bishop has once or twice, of alms, repaired a bridge, this binds not, yet it is evidence against him that he ought to repair, unless he proves the contrary. 2 *Inst.* 700.

Reputation is not evidence on an indictment against an individual for not repairing a bridge, *ratione tenuræ*. *Per Pattison J. Antrobus's case*, 6 *C. & P.* 790.

Proof in defence—by counties.] Where a county is indicted, and the defence is that a parish or other district, or a corporation, or individual, is liable to the repairs, this defence must be specially pleaded, and cannot be given in evidence under the general issue of *not guilty*. *R. v. Inhab. of Wilts*, 1 *Salk.* 359, 2 *Lord Raym.* 1174. 1 *Russell*, 356. 2 *Stark. Ev.* 191. 2*d. ed.* Upon that plea the defendants can only give evidence in denial of the points which must be established on the part of the

prosecution, viz. 1, that the bridge is a public one; 2, that it is within the county; and, 3, that it is out of repair. 2 *Stark. Ev.* 191. 2*d ed.* With a view to the first point, the inhabitants of a county may show under *not guilty*, that a district or individual is bound to repair, as a medium of proof that the bridge is not a public bridge. *Id. R. v. Inhab. of Northampton*, 2 *Maule & S.* 262. For repairs done by an individual are to be ascribed rather to motives of interest in his own property, than to be presumed to be done for the public benefit. *Per Ld. Ellenborough, ibid.*

Upon a special plea by a county, that some smaller district or some individual is liable to repair, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual. 2 *Stark. Ev.* 192. 2*d ed.*

Proof in defence—by minor districts, or individuals.] Where a parish, or other district, or a corporation, or individual, not chargeable of common right with the repairs of a bridge, is indicted, they may discharge themselves under the general issue. *R. v. Inhab. of Norwich*, 1 *Str.* 177. For as it lies on the prosecutor specially to state the grounds on which such parties are liable, they may negative those parts of the charge under the general issue. 1 *Russell*, 356. *Sed vide R. v. Hendon*, 4 *B. & Ad.* 628. *ante, p.* 248.

Proof in defence—by corporation.] A corporation may be bound by prescription to repair a bridge, though one of their charters within time of legal memory use words of incorporation, and though the bridge may have been repaired out of the funds of a guild; for such repairs will be taken to have been made in ease of the corporation. *R. v. Mayor, &c. of Stratford-upon-Avon*, 14 *East*, 348.

Venue and trial.] By statute 1 Ann. st. 1. c. 18. s. 5. "all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere." It seems that no inhabitant of a county ought to be a juror on a trial of an issue whether the county is bound to repair. *Hawk. P. C. b.* 1. *c.* 77. *s.* 6. In such cases, upon a suggestion, the *venire* will be awarded into a neighbouring county. *R. v. Inhab. of Wilts*, 6 *Mod.* 307. 1 *Russell*, 358.

Competency of witnesses.] By stat. 1 Ann. stat. 1. c. 18. s. 13. reciting "that many private persons, or bodies politic or corporate, were of right obliged to repair decayed bridges and the highways thereto adjoining," the evidence of the inhabitants of the county, &c. is made admissible. *Vide ante, p.* 110.

Maliciously pulling down, &c.] By statute 7 & 8 G. 4. c. 30. s. 13. it is enacted, "That if any person shall unlawfully and maliciously pull down, or in anywise destroy any public bridge, or do any injury with intent, and so as thereby, to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned for any term not exceeding four years, and if a male to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment."

BURGLARY.

Offence at common law 253
Statute 7 & 8 G. 4. c. 29. 253
Proof of the breaking 253
General instances 254
Doors 254
Windows 255
Chimnies 256
Fixtures, cupboards, &c. 257
Walls 257
Gates 258
Constructive breaking 258
Fraud 258
Conspiracy 258
Menaces 259
By one of several 259
Proof of the entry 259
Introduction of fire-arms or instruments . . 260
By firing a gun into the house . . . 261
Constructive entry—by one of several . . 261
Proof of the premises being a mansion-house . . 261
Occupation 264
Temporary or permanent . . . 265
House divided without internal communication, and occupied by several . . 266
occupied by same person . . 267
Where there is an internal communication, but the parts are occupied by several, under distinct titles . . . 268

By lodgers 269
By wife or family 270
By clerks or agents of public companies, &c. 271
By servants—occupying as such . . 273
Occupying as tenants . . 275
By guests, &c. 276
By partners 277
Outbuildings and curtilage . . . 277
Proof of the offence having been committed in the night-time 278
Proof of the intent to commit felony—felony at common law or by statute 279
Variance in statement of . . . 281
Minor offence, larceny, &c. 281
Proof of the breaking out of a dwelling-house, &c. . 283
Proof, upon plea of autrefois acquit . . . 283

Offence at common law.] Burglary is a felony at common law, and a burglar is defined by Lord Coke as "he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 *Inst.* 63. And this definition is adopted by Lord Hale. 1 *Hale, P. C.* 549. *Hawk. P. C. b.* 1. *c.* 38, *s.* 1.

Statute 7 *&* 8 *Geo.* 4. *c.* 29.] By statute 7 & 8 G. 4. c. 29. s. 11. it is enacted, "That every person convicted of burglary shall suffer death as a felon;" and it is thereby *declared*, "that if any person shall enter the dwelling-house of another, with intent to commit felony; or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary."

Upon the trial of an indictment for the offence of burglary, the prosecutor must prove, 1, the breaking; 2, the entering; 3, that the house broken and entered was a mansion-house; 4, that the breaking and entry were in the night-time; 5, that the breaking and entering were with intent to commit a felony.

The offence of breaking out of a mansion-house in the night-time will be separately treated.

Proof of the breaking.] What shall constitute a *breaking* is thus described by Hawkins:—"It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*,

except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c., or draw any thing out of a house through a door or window which was open before, or enter into the house through a door open in the day-time, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary." *Hawk. P. C. b.* 1. *c.* 38. *s.* 4, 5.

Proof of breaking—general instances.] Proof of breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing a latch, when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window, with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided: these are all proofs of a breaking. 2 *East, P. C.* 487. 2 *Russ.* 3.

Proof the breaking—doors.] Entering the house through an open door is not, as already stated, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time, through an open door or window, and when within the house turns the key of, or unlatches, a chamber door, with intent to commit felony, it is a burglary. 1 *Hale, P. C.* 553. So where the prisoner entered the house by a back-door which had been left open by the family, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street-door on the inside and went out; this was held by the judges to be burglary. *Johnson's case,* 2 *East, P. C.* 488. So where the master lay in one part of the house, and the servants in another, and the stair-foot door of the master's chamber was latched, and the servant in the night unlatched that door, and went into his master's chamber with intent to murder him, it was held burglary. *Haydon's case, Hutt.* 20, *Kel.* 67, 1 *Hale, P. C.* 554, 2 *East, P. C.* 488.

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage,) was an open entrance or gateway, capable of admitting waggons, intended for the purpose of loading them with flour, through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it and remained closed with their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller J.

held that this was a sufficient breaking to constitute the offence of burglary. *Brown's case*, 2 *East*, *P. C.* 487. In another case, upon nearly similar facts, the judges were equally divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but it was not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges, including Lord Ellenborough, C. J. and Mansfield, C. J., thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. *Callan's case*, *Russ. & Ry.* 157. It has been observed, that the only difference between this and *Brown's case* (*supra*,) seems to be, that in the latter there were no internal fastenings, which in *Callan's case* there were; but that in neither case were any in fact used, but that the compression or fastening, such as it was, was produced by the mere operation of natural weight in both cases. *Russ. & Ry.* 158. (*n.*) The authority of *Brown's case* has been since followed, and that decision may now be considered to be law. Upon an indictment for burglary, the question was whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase. The entrance to the cellar from the outside was by means of a flap which let down; the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. *Russell's case*, 1 *Moody*, *C. C.* 377. *See Lawrence's case*, 4 *C. & P.* 231.

Proof of the breaking—windows.] Where a window is open, and the offender enters the house, this is no breaking, as already stated, *ante*, *p.* 254. And where the prisoner was indicted for *breaking* and entering a dwelling-house and stealing therein, and it appeared that he had effected an entrance by pushing up or raising the lower sash of the parlour-window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a *breaking*. *Smith's case*, 1 *Moody*, *C. C.* 178. A square of glass in the kitchen-window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed. The aperture formed by the half square was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement.

One of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done he removed the fastening of the casement; the window being thus opened the two prisoners entered the house. The doubt which the learned judges (Alderson, J., consulting Patteson, J.) entertained, arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house), from enlarging an aperture by lifting up further the sash of the window, as in *Smith's case, supra*; but the learned judges thought it was worth considering whether in both cases the facts did not constitute, in point of law, a sufficient breaking. Upon a case reserved, all the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. *Robinson's case*, 1 *Moody, C. C.* 327.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. *Hall's case, Russ. & Ry.* 355. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weight only, is a breaking, although there is an outer shutter which is not fastened. *Haine's case, Russ. & Ry.* 451.

Where a cellar-window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, Vaughan, B. ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. *Lewis's case*, 2 *C. & P.* 628.

Proof of the breaking—chimnies.] It was one time considered doubtful whether getting into the chimney of a house in the night-time, with intent to commit felony, was a sufficient *breaking* to constitute burglary. 1 *Hale, P. C.* 552. But it is now settled that this is a breaking; for though actually open, it is as much inclosed as the nature of the place will allow. *Hawk. P. C. b.* 1. *c.* 38. *s.* 6. 2 *East, P. C.* 485. And accordingly it was so held, in a late case, by ten of the judges, (contrary to the opinion of Holroyd, J. and Burrough, J.) Their lordships were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner by lowering himself in the chimney, made an entry into the dwelling-house. *Brice's case, Russ. & Ry.* 450.

Proof of the breaking—fixtures, cupboards, &c.] The breaking open of a moveable chest or box in a dwelling-house, in the night-time, is not such a breaking as will make the offence burglary, for the chest or box is no part of the mansion-house. *Foster*, 108. 2 *East*, *P. C.* 488. Whether breaking open the door of a cupboard let into the wall of a house, be burglary or not, does not appear ever to have been solemnly decided. In 1690, a case in which the point arose, was reserved for the opinion of the judges, and they were equally divided upon it. *Foster*, 108. Lord Hale says that such a breaking will not make a burglary at common law. 1 *Hale*, *P. C.* 527. Though, on the authority of *Simpson's case*, *Kel.* 31, 2 *Hale*, *P. C.* 358, he considers it a sufficient breaking within the stat. 39 Eliz. c. 15. In the opinion of Mr. Justice Foster, however, *Simpson's case* does not warrant the latter position. *Foster*, 108. 2 *East*, *P. C.* 489. And see 2 *Hale*, *P. C.* 358 (*n*). Mr. Justice Foster concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for this purpose be considered in no other light than as mere moveables. *Foster*, 109. 2 *East*, *P. C.* 489.

Proof of the breaking—walls.] Whether breaking a *wall*, part of the curtilage is a sufficient breaking to constitute burglary, has not been decided. Lord Hale, after citing 22 *Assiz.* 95. which defines burglary to be, "to break houses, churches, *walls*, courts, or *gates*, in time of peace," says—"by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night breaks the *wall* or the gate thereof, and finding the doors of the gate open enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary." 1 *Hale*, *P. C.* 559. Upon this passage an annotator of the *Pleas of the Crown* observes, "This was anciently understood only of the walls or gates *of the city* (vide Spelman, *in verbo Burglaria*). If so, it will not support our author's conclusion, wherein he applies it to the wall of a private house." *Id.* (*n.*) *ed.* 1778. It has been likewise observed upon this passage, that the distinction between breaking, and coming over the wall or gate, is very refined, for if it be part of the mansion, for the purpose of burglary, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary. 2 *East*, *P. C.* 488. In these observations another writer of eminence concurs. 2 *Russell*, 5.

Proof of the breaking—gates.] Where a gate forms part of the outer fence of a dwelling-house only, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus where large gates opened into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely enclosed, the judges were unanimous that the outward fence of the curtilage not opening into any of the buildings was no part of the dwelling-house. *Bennett's case, Russ. & Ry.* 289. So where the prisoner opened the area gate of a house in London with a skeleton-key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. *Davis's case, Russ. & Ry.* 322.

Proof of breaking—constructive breaking—fraud.] In order to constitute such a breaking as will render the party subject to the penalties of burglary, it is not essential that force should be employed. There may be a constructive breaking by fraud, conspiracy, or threats, which will render the person who is a party to it equally guilty as if he had been guilty of breaking with force. Where, by means of fraud, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. Thieves came with a pretended hue and cry, and requiring the constable to go with them to search for felons, entered the house, bound the constable and occupier, and robbed the latter. So where thieves entered a house, pretending that the owner had committed treason; in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 *Hale, P. C.* 552, 553. The prisoner knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house and went off. This being in the night-time, was held by Holt, C.J., Tracy, and Bury, to be burglary. *Hawkin's case,* 2 *East, P. C.* 485. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 *East, P. C.* 485. So where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him. *Kel.* 52, 53. *Hawk. P. C. b.* 1. *c.* 38. *s.* 9.

Proof of the breaking—constructive breaking—conspiracy.] A breaking may be effected by conspiring with persons within the house, by whose means those who are without effect an en-

trance. Thus if A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door and lets him in, this, according to *Dalton* (*cap.* 99), is burglary in C. and larceny in A. But according to Lord Hale, it is burglary in both; for if it be burglary in C. it must necessarily be so in A., since he is present and assisting C. in the committing of the burglary. 1 *Hale, P. C.* 553. John Cornwall was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the night-time opened the street-door and let in the other prisoner, who robbed the house, after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, and Cornwall was executed. *Cornwall's case*, 2 *Str.* 881. 4 *Bl. Com.* 227. 2 *East, P. C.* 486.

Proof of breaking—constructive breaking—menaces.] There may also be a breaking in law, where, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of force, or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 *East, P. C.* 480. But if the owner only throw the money out of the house to the thieves who assault it, this will not be burglary. *Id. Hawk. P. C. b.* 1. *c.* 38. *s.* 3. Though if the money were taken up in the owner's presence, it would be robbery. But in all other cases where no fraud or conspiracy is made use of, or violence commenced or threatened in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 *East, P. C.* 486. *Hale, Sum.* 80.

Proof of breaking—constructive breaking—by one of several.] Where several come to commit a burglary, and some stand to watch in adjacent places, and others enter and rob, in such cases the act of one is, in judgment of law, the act of all, and all are equally guilty of the burglary. 1 *Hale, P.C.* 439, 534. 3 *Inst.* 63. 2 *East, P. C.* 486.

Proof of the entry.] It is not sufficient to show a *breaking* only; the prosecutor must also prove an *entry* as well as a breaking, and both must be in the night and with intent to commit a felony, otherwise it is no burglary. 1 *Hale, P. C.* 555. If any part of the body be within the house, hand or foot, this is sufficient. *Foster*, 108. 2 *East, P. C.* 490. Thus where the prisoner cut a hole through the window-shutters of the prosecutor's shop, and putting his hand through the hole, took out watches, &c., but no other entry was proved, this was held to

be burglary. *Gibbon's case, Foster,* 108. So where the prisoner broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch) and introduced his hand within, for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. *Bailey's case, Russ. & Ry.* 341. The prosecutor standing near the window of his shop, observed the prisoner with his finger against part of the glass. The glass fell inside by the force of his finger. The prosecutor added, that standing as he did in the street, he saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. *Davis's case, Russ. & Ry.* 499.

The getting in at the top of a chimney, as already stated, *ante, p.* 256, has been held to be a *breaking*, and the prisoner's lowering himself down the chimney, though he never enters the room, has been held to be an entry. *Brice's case, Russ. & Ry.* 451.

Proof of entry—introduction of fire-arms or instruments.] Where no part of the offender's body enters the house, but he introduces an instrument, whether that introduction will be such an entry as to constitute a burglary, depends, as it seems, upon the object with which the instrument is employed. Thus if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand be not in, this is an entry. 1 *Hale, P.C.* 555. *Hawk. P.C. b.* 1. *c.* 38. *s.* 11. 2 *East, P. C.* 490.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be such an entry as to constitute burglary. Thus where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found inside the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, the entry was ruled to be incomplete. *Hughes's case,* 2 *East, P. C.* 491, 1 *Leach,* 406, *Hawk. P. C. b.* 1. *c.* 38. *s.* 12. A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a case reserved, the judges were of opinion that this was not burglary, there being no

proof that any part of the prisoner's hand was within the window. *Rust's case*, 1 *Moody*, *C. C.* 183.

Proof of entry—by firing a gun into the house.] It has been already stated, that if a man breaks a house and puts a pistol in at the window with intent to kill, this amounts to burglary. 1 *Hale*, *P. C.* 555, *ante p.* 260. "But," says Lord Hale, "if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary—*quære.*" Hawkins, however states, that the discharging a loaded gun into a house is such an entry as will constitute burglary; *Hawk. P. C. b.* 1. *c.* 38. *s.* 11; and this opinion has been followed by Mr. East and Mr. Serjt. Russell. "It seems difficult," says the former, "to make a distinction between this kind of implied entry, and that, by means of an instrument introduced between the window or threshold for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is held in the hand, and the other is discharged from it. No such distinction, however, is any where laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony." 2 *East*, *P. C.* 490, 2 *Russ* 11. It was ruled by Lord Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. *Pickering v. Rudd*, 4 *Campb.* 220, 1 *Stark.* 58.

Proof of entry—constructive entry—by one of several.] It is not necessary in all cases to show an actual entry by all the prisoners; there may be a constructive *entry* as well as a constructive *breaking*. A. B. and C. come in the night by consent to break and enter the house of D. to commit a felony; A. only actually breaks and enters the house, B. stands near the door, but does not actually enter, C. stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals. 1 *Hale*, *P. C.* 555. So where a man puts a child of tender years in at the window of the house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infancy. *Id.* And so if the wife, in the presence of the husband, by his threats or coercion break and enter a house in the night, this is burglary in the husband, though the wife, the immediate actor, is excused by the coercion of her husband. *Id.* 556.

Proof of the premises being a mansion-house.] It must be proved that the premises broken and entered were either a mansion-house or parcel of the mansion-house. Every house for the dwelling, and habitation of man is taken to be a mansion-

house, wherein burglary may be committed. 3 *Inst.* 64-5, 2 *East, P. C.* 491.

A mere tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 *Hale, P. C.* 557. 4 *Bl. Com.* 225. But where the building was a permanent one of mud and brick on the down at Weyhill, erected only as a booth for the purposes of a fair for a few days in the year, having wooden doors and windows bolted inside, it was held that as the prosecutor and his wife slept there every night of the fair, (during one of which it was broken and entered) this was a dwelling-house. *Smith's case, coram Park, J.*, 1 *Moody & Robinson*, 256.

The mere fact of a building in the neighbourhood of a dwelling-house being occupied together with the dwelling-house, by the same tenant, (not taking into consideration the question of the building being within the same curtilage, as to which *vide post* p. 263,) will not render the former building a *dwelling-house* in point of law. The prisoner broke and entered an out-house in the possession of G. S., and occupied by him with his dwelling-house, but not connected therewith by any fence inclosing both. The judges held that the prisoner was improperly convicted of burglary. The out-house being separated from the dwelling-house, and not within the same curtilage, was not protected by the bare fact of its being occupied with it at the same time. *Garland's case*, 2 *East, P. C.* 403. So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure; upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the houses adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. *Eggington's case*, 2 *East, P. C.* 494. The house of the prosecutor was in High-street, Epsom. There were two or three houses there, insulated like Middle-row, Holborn. At the back of the houses was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz. a kitchen, a coach-house, a larder, and a brew-house. Over the brew-house a servant boy always slept, but no one else; and in this room the offence was committed. There was no communication between the dwelling-house and these buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the judges were of opinion that the room in question was not parcel

of the dwelling-house in which the prosecutor dwelt, because it did not adjoin it, was not under the same roof, and had no common fence. Graham B. dissented, being of opinion that it was parcel of the house. But all the judges present thought that it was a distinct dwelling-house of the prosecutor. *Westwood's case, Russ. & Ry.* 495.

In the following case, however, the building, though not within the curtilage, and having no internal communication, was held to constitute part of the dwelling-house. The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of buildings, in the order mentioned, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be burglary, for the barn which was under the same roof, was parcel of, and enjoyed with the dwelling-house. *G. Brown's case,* 2 *East, P. C.* 493.

So in the following case, the premises broken and entered were not within the same external fence, as the dwelling-house, nor had they any internal communication with it, yet they were held to be part of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the workshops and the dwelling-house, nor were they surrounded by any external fence. Upon a case reserved, the judges were unanimously of opinion that the workshops were parcel of the dwelling-house. *Chalking's case, Russ. & Ry.* 334, *see also Lithgo's case, Id.* 357.

In the case about to be mentioned, the premises broken and entered were within the curtilage, but without any internal communication with the dwelling-house. It does not appear whether the decision proceeded upon the same ground as the last case, or whether on the ground that the building in question was within the curtilage. The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other, (within the common inclosure,) being through an open passage into the factory passage, which communicated with a lumber-room in the factory, from which there was a staircase which led into the yarn-room, where the felony was committed. On a case reserved, all the judges held that the room in question was properly described as the dwelling-house of the prosecutor. *Hancock's case, Russ. & Ry.* 171. *See also Clayburn's case, Id.* 360.

Proof of the premises being a mansion-house—occupation.] It must appear that the premises in question were, at the time of the offence, occupied as a *dwelling-house*. Therefore where a house was under repair, and the tenant had not entered into possession, but had deposited some of his goods there, but no one slept in it, it was held not to be a mansion-house, so as to make the breaking and entering a burglary. *Lyon's case*, 1 *Leach*, 185, 2 *East*, *P. C.* 497. Nor will the circumstance of the prosecutor having procured a person to sleep in the house, (not being one of his own family) for its protection, make any difference. Thus where a house was newly built and finished in every respect, except the painting, glazing, and flooring of one garret, and a workman who was constantly employed by the prosecutor slept in it for the purpose of protecting it, but no part of the prosecutor's domestic family had taken possession, it was held at the Old Bailey, on the authority of *Lyon's case*, (*supra*,) that it was not the dwelling-house of the prosecutor. *Fuller's case*, 1 *Leach*, 186, (*n.*) So where the prosecutor took a house, and deposited some of his goods in it, and not having slept there himself procured two persons (not his own servants) to sleep there for the purpose of protecting the goods, it was held at the Old Bailey, that as the prosecutor had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, but had neither slept in it himself, nor had any of his servants, it could not in contemplation of law be called his *dwelling-house*. *Harris's case*, 2 *Leach*, 701, 2 *East*, *P. C.* 498. *See also Hallard's case*, *coram Buller J.* 2 *Leach*, 701, (*n.*) *Norreg Thompson's case*, 2 *Leach*, 771. The following case, decided upon the construction of the statute 12 Anne, c. 7, is also an authority on the subject of burglary. The prosecutor, a publican, had shut up his house, which in the day time was totally uninhabited, but at night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor, that he had no intention whatever to reside in the house, either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. *Davies's, alias Silk's case*, 2 *Leach*, 876, 2 *East*, *P. C.* 499.

Where no person sleeps in the house, it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlour, with a stair-case to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother who lived next door. Every morning he went to his

shop, transacted his business, dined, and staid the whole day there, considering it as his home. When he first bought the house he had a tenant, who quitted it soon afterwards, and from that time no person had slept in it. On a case reserved, all the judges held that this was not a dwelling-house. *Martin's case, Russ. & Ry.* 108.

It seems to be sufficient if any part of the owner's family, as his domestic servants, sleep in the house. A. died in his house. B. his executor put servants into it, who lodged in it, and were at board wages, but B. never lodged there himself. Upon an indictment for burglary, the question was whether this might be called the mansion-house of B.? The court inclined to think that it might, *because the servants lived there;* but upon the evidence there appeared no breach of the house. *Jones's case,* 2 *East, P. C.* 499.

Proof of the premises being a dwelling-house—occupation—temporary or permanent.] A house is no less a dwelling-house, because at certain periods the occupier quits it, or quits it for a temporary purpose. If A., says Lord Hale, has a dwelling-house, and he and all his family are absent a night or more, and in their absence, in the night, a thief breaks and enters the house to commit felony, this is burglary. 1 *Hale, P. C.* 556. 3 *Inst.* 64. So if A. have two mansion-houses, and is sometimes with his family in one, and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. *Id.* 4 *Rep.* 40. *a.* Again if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. *Evans & Finche's case, Cro. Car.* 473. 1 *Hale, P. C.* 556. The prosecutor being possessed of a house in Westminster in which he dwelt, took a journey into Cornwall, with intent to return, and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open, and robbed. He returned a month after with his family, and inhabited there. This was adjudged burglary, by Holt, C. J., Treby, J., and four other judges. *Murry's case,* 2 *East, P. C.* 496, *Foster,* 77.

In these cases the owner must have quitted his house *animo revertendi,* in order to have it still considered as his mansion, if neither he nor any part of his family were in it at the time of the breaking and entering. 2 *East, P. C.* 496. The prosecutor had a house at Hackney, which he made use of in the summer, his chief residence being in London. About the latter end of the summer he removed to his town house, bringing away a considerable part of his goods. The following November his house at Hackney was broken open, upon which he removed the remainder of his furniture, except a few articles

of little value. Being asked whether at this time he had any intention of returning to reside, he said he had not come to any settled resolution, whether to return or not, but was rather inclined totally to quit the house and let it. The burglary happened in the January following, but the court (at the Old Bailey) were of opinion that the prosecutor having left his house and disfurnished it, without any settled resolution to return, but rather inclining to the contrary, it could not be deemed his dwelling-house. *Nutbrown's case, Foster*, 77, 2 *East, P. C.* 496.

It seems that the mere casual use of a tenement, as a lodging, or only upon some particular occasion, will not constitute a dwelling house. 2 *East, P. C.* 497. Where some corn had been missed out of a barn, the prosecutor's servant and another person put a bed in the barn, and slept there, and upon the fourth night the prisoner broke and entered the barn; upon a reference, it was agreed by all the judges that this sleeping in the barn made no difference. *Brown's case*, 2 *East, P. C.* 501. So a porter lying in a warehouse, *to watch goods*, which is only for a particular purpose, does not make it a dwelling-house. *Smith's case*, 2 *East, P. C.* 497. *ante, p.* 264.

Proof of the premises being a dwelling-house—occupation—house divided, without internal communication, and occupied by several.] Where there is an actual severance in fact of the house, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, the part so separately occupied is the dwelling-house of the person living in it, provided he dwell there. If A. lets a shop, parcel of his dwelling-house, to B. for a year, and B. holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A., for it was severed by the lease during the term; but if B. or his servant sometimes lodge in the shop, it is the mansion house of B., and burglary may be committed in it. 1 *Hale, P. C.* 557. *Vide Sefton's case, post, p.* 267.

The prosecutors, Thomas Smith and John Knowles, were in partnership, and lived next door to each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners, and were now perfectly distinct, there being no communication from one to the other, without going into the street. The housekeeping, servants' wages, &c. were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of the prosecutor Smith. On the trial, before Eyre, C. B. and Gould, J. at the Old Bailey, it was objected that the burglary ought to have been laid to be in the dwelling-house of the prosecutor Smith only; and of this opinion was the court. *Martha Jones's case*, 1 *Leach*, 537, 2 *East, P. C.* 504. But it

is otherwise where there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. But it was thought to be a case of much nicety. *Sefton's case*, 2 *Russell*, 14, *Russ. & Ry.* 203.

Chambers in the inns of court are to all purposes considered as distinct dwelling houses, and therefore whether the owner happens to enter at the same outer door or not, will make no manner of difference. The sets are often held under distinct titles, and are, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. 2 *East*, P. C. 505, 1 *Hale*, P. C. 556.

Proof of the premises being a dwelling-house—occupation—house divided, without internal communication, but all occupied by the same person.] We have seen, that where a house is divided, and there is no internal communication between the two parts, which are occupied by separate tenants, each part is to be considered as the dwelling-house of the tenant living in it. *Ante*, p. 266. But where a house is thus severed, and the owner dwells in one part of it only, and the other part is broken and entered in the night; whether this shall be deemed a burglary seems a question of much nicety. According to the authorities, before the late statute 7 & 8 Geo. 4. c. 29. s. 13. it was held to be burglary. In the following case, the severed part of the premises had been let to another person, but that circumstance was held to make no difference, and the tenant of the other part was held to be the tenant of the whole, there being the same outer door.

The prosecutor was the owner of a house, in which he resided, and to which house there was a shop adjoining, built close to the house. There was no internal communication between the house and the shop, the only door of the latter being in the court-yard before the house, which yard was inclosed by a brick wall, including the house and shop. The prosecutor let the shop, together with some apartments in the house, to one Hill, from year to year. There was only one common door to the house, which communicated as well to the prosecutor's as to Hill's apartments. The burglary was committed in the shop. On a case reserved, the judges were all of opinion that the shop was rightly laid to be the dwelling house of the prosecutor, who inhabited in one part, there being but one outer door, especially as it was within one curtilage, or fence; and that the

shop, being let with a part of the house inhabited by Hill, still continued to be a part of the dwelling-house of the prosecutor, though there was no internal communication between them. But it was admitted, that if the shop had been let by itself, Hill not dwelling therein, burglary could not have been committed in it, for then it would have been severed from the house. *Gibson's case*, 2 *East*, *P. C.* 508. This decision was acted upon by Holroyd, J. in the following case. The prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not communicate with the loft in any manner. On the side of the house was a shop, which was not used as a dwelling-house, and which did not communicate with the four chambers. Between this shop and the loft there was a communication, by means of a ladder. The dwelling-house and the shop both opened into the same fold. Holroyd, J. on the authority of *Gibson's case*, *supra*, held the loft to be a dwelling-house. *Thompson's case*, *Lewin*, *C. C.* 32.

It does not clearly appear in *Gibson's case*, whether the shop was considered to be part of the dwelling-house, strictly speaking, (in the same manner as if it had been any of the other apartments,) or whether it was only taken to be part of the dwelling-house as being within the same curtilage or fence, the judges using the expression, "especially as it was within one curtilage or fence." If it was decided upon the latter ground, it would now, since the 7 & 8 Geo. 4. c. 29. s. 13., be a question how far the shop would be considered a part of the dwelling-house, there being no communication between the two. According to the case of *Burrowes*, 1 *Moody*, *C. C.* 274, *post*, *p.* 278, in which the judges were divided, seven to five, the shop would still be considered as part of the dwelling-house.

Proof of the premises being a dwelling-house—occupation—where there is an internal communication, but the parts are occupied by several under different titles.] Although in the case of lodgers and inmates, who hold under one general occupier, the whole of the house continues to be his dwelling-house, if there be an internal communication, and the parties have a common entrance, *vide post*, *p.* 269, yet it is otherwise where several parts of a building are let under distinct leases. The owner of a dwelling-house and warehouse under the same roof, and communicating internally, let the house to A. (who lived there), and the warehouse to A. and B., who were partners. The communication between the house and warehouse was constantly used by A. The offence was committed in the warehouse, which was laid to be the dwelling-house of A. On a case reserved, the judges were of opinion that this was wrong, A. holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and B. *Jenkins's case*, *Russ. & Ry.* 244.

Proof of the premises being a dwelling-house—occupation—by lodgers.] Where separate apartments were let in a dwelling house to lodgers, it seems formerly to have been doubted whether they might not in all cases be described as the mansion house of the lodgers. 2 *East, P. C.* 505, *Hawk. P. C. b.* 1. *c.* 38. *s.* 13, 14. But the rule is now taken to be, according to the opinion of *Kelynge* (p. 84.), that if the owner, who lets out apartments in his house to other persons, sleeps under the same roof, and has but one outer door, common to himself and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and his lodgers enter by different outer doors, the apartments so let are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt, C. J. at the Old Bailey, in 1701, although in that case the rooms were let for a year, under a rent, and Tanner, an ancient clerk in court, said that this was the constant course and practice. 2 *East, P. C.* 505, 1 *Leach*, 90. (*n.*)

Where one of two partners is the lessee of a shop and house, and the other partner occupies a room in the house, he is only regarded as a lodger. Morland and Gutteridge were partners; Morland was the lessee of the whole premises, and paid all the rent and taxes for the same. Gutteridge had an apartment in the house, and allowed Morland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The burglary was committed in the shop, which was laid to be the dwelling-house of Morland, and the judges held the description right. *Parmenter's case*, 1 *Leach*, 537. (*n.*)

In the following cases, the apartments of the lodger were held to be his dwelling-house. The owner let the whole of a house to different lodgers. The prosecutor rented a room on the first floor, a shop and parlour on the ground floor, and a cellar underneath the shop, at 12*l.* 10*s.* a-year. The owner took back the cellar, to keep lumber in, for which he allowed the prosecutor a rebate of 40*s.* a-year. The entrance was into a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlour, and beyond the parlour was the stair-case which led to the upper apartments. The shop and parlour doors were broken open, and the judges determined that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before mentioned. *Rogers's case*, 1 *Leach*, 89, 428, 2 *East, P. C.* 506, 507, *Hawk. P. C. b.* 1. c. 38. *s.* 29.

The house in which the offence was committed belonged to one Nash, who did not live in any part of it himself, but let the

whole of it out in separate lodgings from week to week. John Jordan, the prosecutor, had two rooms, viz., a sleeping-room, and a workshop in the garret, which he rented by the week as tenant at will to Nash. The workshop was broken and entered by the prisoner. Ten judges, on a case reserved, were unanimously of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment properly charged it to be the dwelling-house of Jordan. *Carrell's case*, 1 *Leach*, 237, 429, 2 *East*, *P. C.* 506. The prisoner was indicted under the statute 3 & 4 W. & M. c. 9. s. 1. for breaking and entering a dwelling-house, and stealing therein. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. (whose dwelling-house it was laid to be) rented a parlour on the ground-floor, and a single room up one pair of stairs, where he slept. The judges were of opinion that the indictment rightly charged the room to be the dwelling-house of J. L. *Trapshaw's case*, 1 *Leach*, 427, 2 *East*, *P. C.* 506. 780.

It follows, from the principle of the above cases, that if a man lets out part of his house to lodgers, and continues to inhabit the rest himself, if he breaks open the apartment of a lodger, and steals his goods, it is felony only, and not a burglary, for it cannot be burglary to break open his own house. 2 *East*, *P. C.* 506. *Kel.* 84.

Proof of the premises being a dwelling-house—occupation—by wife or family.] The actual occupation of the premises by any part of the prosecutor's domestic family, will be evidence of its being his dwelling-house. The wife of the prosecutor had for many years lived separate from her husband. When she was about to take the house, in which the offence was afterwards committed, the lease was prepared in her husband's name, but he refused to execute it, saying he would have nothing to do with it, in consequence of which, she agreed with the landlord herself, and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid to be the dwelling-house of the husband. *Farre's case*, *Kel.* 43, 44, 45. In a similar case, where there was the additional fact, that the wife had a separate property vested in trustees, the judges were clear that the house was properly laid to be the dwelling-house of the husband. It was the dwelling-house of some one. It was not the wife's; because, at law, she could have no property; it was not the trustees', because they had nothing to do with it; it could then only be the husband's. *French's case*, *Russ. & Ry.* 491. So where the owner of a house, who had never lived in it, permitted his wife, on their separation, to reside there, and the wife lived there in adultery with another man, who paid the expenses of housekeeping, but neither rent nor taxes, this was held by the judges to be pro-

perly described as the dwelling-house of the husband. *Wilford's case, Russ. & Ry.* 517. *And see Smyth's case,* 5 *C. & P.* 203.

Proof of the premises being a dwelling-house—occupation—by clerks and agents in public offices, companies, &c.] An agent or clerk employed in a public office, or by persons in trade, is in law the servant of those parties, and if he be suffered to reside upon the premises, which belong to the government, or to the individuals employing him, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking the lodgings of Sir Henry Hungate, at Whitehall; and the judges were of opinion, that it should have been laid to be the King's mansion-house at Whitehall. *Williams's case,* 1 *Hale, P. C.* 522. 527. The prisoner was indicted for breaking into a chamber in Somerset-house, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the Queen-mother. *Burgess's case, Kel.* 27. The prisoner was indicted under the 12 Anne, c. 7. for stealing a gold watch in the dwelling-house of W. H. Bunbury, Esq. The house was the invalid office, at Chelsea; an office under government. The ground-floor was used by the paymaster-general, for the purpose of conducting the business relating to the office. Mr. Bunbury occupied the whole of the upper part of it; but the rent and taxes of the whole were paid by government. The court (at the Old Bailey) held that it was not the dwelling-house of Mr. Bunbury. *Peyton's case,* 1 *Leach,* 324, 2 *East, P. C.* 501. The prisoner was indicted for burglary in the mansion-house of Samuel Story. It appeared that the house belonged to the African Company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there. But Holt C. J., Tracy J., and Bury B., held this to be the mansion-house of the company, for though an aggregate corporation cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants. *Hawkins's case,* 2 *East, P. C.* 501, *Foster,* 38. So it was held with regard to the dwelling-house of the East India Company, inhabited by their servants. *Picket's case,* 2 *East, P. C.* 501. The prisoner was indicted for breaking and entering the house of the master, fellows, and scholars of Bennet College, Cambridge. The fact was, he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. *Maynard's case,* 2 *East, P. C.* 501. The governor of the Birmingham workhouse was appointed under contract for seven years, and had the chief part of the house for his own occupation; but the guardians and overseers who appointed him, reserved to themselves the use of one room for an office, and of three others for store rooms.

The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but upon a case reserved, the judges held the description wrong. *Wilson's case*, *Russ. & Ry.* 115.

The following case appears to be at variance with previous authorities, and it may be doubted whether it is to be considered as law. The prosecutor, Sylvester, kept a blanket warehouse in Goswell-street, and resided with his family in the house over the warehouse, which was on the ground-floor, and consisted of four rooms; the second of which was the room broken open. There was an internal door between the warehouse and the dwelling-house. The blankets were the property of a company of blanket manufacturers at Witney, in Oxfordshire, none of whom ever slept in the house. The whole rent, both of the dwelling-house and warehouse, was paid by the company, to whom Sylvester acted as servant or agent, and received a consideration for his services from them, part of which consideration he said was his being permitted to live in the house rent free. The lease of the premises was in the company. The court (Graham B., and Grose J.,) were clearly of opinion that it was rightly charged to be the dwelling-house of Sylvester; for though the lease of the house was held, and the whole rent reserved paid by the company in the country, yet, as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense to consider it as their dwelling-house, especially, as it was evident that the only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. It was the means by which they in part remunerated Sylvester for his agency, and was precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain, however, the court observed, took another shape. The company preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein towards the salary which he was to receive from them. It was, therefore, essentially and truly, the dwelling of the person who occupied it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; but it would be absurd to suppose that that terror which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney. *Margetts's case*, 2 *Leach*, 930.

It has been observed, that the accuracy of the reason given in the above judgment with regard to protecting the actual occupant, may, perhaps, be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indict-

ment as committed in the dwelling-house of the real owner. And with respect to the terror in this case, not having affected the company at Witney, the same might have been said of the terror to the East India Company or the African Company, in the cases of burglary in their houses. *(Vide supra.)* In the course of this case, Mr. Justice Grose inquired if there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided; but in which the clerks of the company generally lived; and Mr. Knapp informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall which was broken open, and in that case the court held it to be his father's house. 2 *Leach*, 931. (*n.*)

Margetts's case, however, appears to be supported by a very late decision. The prosecutor was secretary to the Norwich Union Insurance Company, and lived with his family in the house used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. The recorder, on the authority of *Margetts's case*, and the case of the clerk of the Haberdashers' Company there mentioned, thought the indictment correct, but reserved the point for the judges, who were of opinion that the house was rightly described as the prosecutor's, since he, his family, and servants were the only persons who dwelt there; and they only were liable to be disturbed by a burglary. Though their lordships would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the prosecutor's. *Witt's case*, 1 *Moody, C. C.* 248.

Proof of the premises being a dwelling-house—occupation—by servants occupying as such.] Where a servant occupies a dwelling-house, or apartments therein, as *a servant*, his occupation is that of his master, and the house is the dwelling-house of the latter. But it is otherwise, where the servant occupies *suo jure* as tenant. Thus, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, can only be described as the dwelling-house of the king or nobleman. *Kel.* 27. 1 *Hale, P. C.* 522, 527. Graydon, a farmer, had a dwelling-house and cottage under the same roof, but they were not inclosed by any wall or court-yard, and had no internal communication. Trumball, a servant of Graydon, and his family, resided in the cottage by agreement with Graydon, when he entered his service. He paid no rent, but an abatement was made in his wages on account of the cottage. The judges (*Buller dub.*) held that this was no more than a licence to Trumball to lodge in the cottage, and did not make it his dwelling-house. *Brown's case*, 2 *East, P. C.* 501.

The prosecutors were partners as bankers, and also as

brewers, and were the owners of the house in question, used in both concerns. There were three rooms with only one entrance by a door from the street. No one slept in these rooms. The upper rooms of the house were inhabited by one John Stevenson, the cooper employed in the brewing concern. He was paid half a guinea a-week, and permitted to have these rooms for the use of himself and family. There was a separate entrance from the street to these rooms. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with Stevenson) and ladder, not locked or fastened, and not used. Stevenson was assessed to the window-tax for his part of the premises, but the tax was paid by his masters. It being objected that the place where the burglary was committed was not the dwelling-house of the prosecutors, the point was reserved, when eight of the judges thought that Stevenson was not a tenant, but inhabited only in the course of his service. Four of the judges were of a contrary opinion. Lord Ellenborough, C. J., said—"Stevenson certainly could not have maintained trespass against his employers if they had entered these rooms without his consent. Does a gentleman who assigns to his coachman the rooms over his stables, thereby make him a tenant? The act of the assessors, whether right or wrong in assessing Stevenson for the windows of the upper rooms, can make no difference, nor is it material in which of the two trades the prosecutors carried on, Stevenson was servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened, and it can make no difference whether the communication between the upper and lower rooms was through a trap-door or by a common staircase." *Stock's case*, 2 *Leach*, 1015, 2 *Taunt.* 339, 1 *Russ. & Ry.* 185. *See Flannagan's case, Russ. & Ry.* 187. *infra.*

In order to render the occupation of a servant the occupation of the master, it must appear that the servant is, properly speaking, such, and not merely a person put into the house for the purpose of protecting it. The prosecutor left the dwelling-house, keeping it only as a warehouse and workshop, without any intention of again residing in it. In consequence of his thinking it not prudent to leave the house without some one in it, two women, employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not take their meals there or use the house for any other purpose than that of sleeping there. Upon an indictment for stealing goods to the amount of more than 40*s.* in the dwelling-house of the prosecutor, the judges held that this could not be considered his dwelling-house. *Flannagan's case, Russ. & Ry.* 187. It is difficult to distinguish this case from

that of *R. v. Stock*, 2 *Leach*, 1015. *supra*, which received an opposite decision.

Still, though the object of the owner of the house in putting in his servants be to protect his property only, yet if *they live there*, their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left the dwelling-house and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought that putting in a servant and his family *to live*, very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. *Gibbon's case*, 2 *Russ.* 19.

Proof of the premises being a dwelling-house—occupation—by servants—as tenants.] Where a servant occupies part of the premises belonging to his master, not as in the cases above mentioned, *ante*, *p.* 273, in the capacity of *servant*, but in the character of tenant, the premises must be described as his dwelling-house. Greaves and Co. had a house and building, where they carried on their trade. Mottran, their warehouseman, lived with his family in the house and paid 11*l.* per annum for rent and coals (the house alone being worth 20*l.* per annum). Greaves and Co. paid the rent and taxes. The judges were of opinion that this could not be laid to be the dwelling-house of Greaves and Co. They thought that as Mottran stood in the character of a tenant (for Greaves and Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), Mottran's occupation could not be deemed their occupation. *Jarvis's case*, 1 *Moody, C. C.* 7.

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent, if, from the other circumstances of the case, it appears that he holds as tenant. The prosecutor (Gent), a collier, resided in a cottage built by the owner of the colliery for whom he worked. He received 15*s.* a-week as wages besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling-house of the prosecutor, Holroyd, J. was of opinion that though the occupation and enjoyment of the cottage were obtained by reason of Gent being the servant of the owner, and co-extensive only with the hiring, yet that his inhabiting the cottage was not as in the cases referred to (2 *East*, *P. C.* 500), correctly speaking, merely as the servant of the owner, nor was it either as to the whole or any part of the cottage as his (the owner's) occupation, or for his use or business or that of the colliery, but wholly for the use and benefit of Gent himself and his family,

in like manner as if he had been paid the rent and taxes; and though the servant's occupation might in law, at the master's election, be considered as the occupation of the master and not of the servant, yet with regard to third persons it might be considered either as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage might be described as the dwelling-house of Gent. *Jobling's case, Russ. & Ry.* 525. A toll-house was occupied by a person employed by the lessee of the tolls at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion that the toll-house was rightly described as his dwelling-house, for he had the exclusive possession of it, and it was unconnected with any premises of the lessee, who did not appear to have any interest in it. *Camfield's case,* 1 *Moody, C.C.* 43.

So where a person who has been servant, remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be described as his dwelling-house. Lord Spencer let a house to Mr. Stephens, who underlet it. The sub-lessee failed and quitted, and no one remained in the house but Ann Pemberton, who had been servant to the sub-lessee. Stephens paid her 15*s.* a week till he died, when she received no payment, but continued in the house. At Michaelmas it was given up to Lord Spencer, but Ann Pemberton was permitted by the steward to remain in it. Bayley, J. thought Ann Pemberton might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid in the indictment as the dwelling-house of Anu Pemberton, as she was there not as a servant but as a tenant at will. *Collet's case, Russ. & Ry.* 498.

Proof of the premises being a dwelling-house—occupation—by guests, &c.] If several persons dwell in one house, as guests or otherwise, having no fixed or certain interest in any part of the house, and a burglary be committed in any of their apartments, it seems clear that the indictment ought to lay the offence in the mansion-house of the proprietor. *Hawk. P. C. b.* 1. *c.* 38. *s.* 26. Therefore, where the chamber of a guest at an inn is broken open, it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest. 1 *Hale, P. C.* 557. It has been said that if the host of an inn break the chamber of his guest in the night to rob, this is burglary. *Dalton, c.* 151. *s.* 4. But it has been observed that this may be justly questioned; for that there seems no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which, Kelyng says, cannot be burglary. *Kel.* 84. 2 *East, P. C.* 582.

It is said by Lord Hale, that if A. be a lodger in an inn, and in the night opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be burglary; and, he continues, it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, it had been burglary. 1 *Hale, P. C.* 554. It has been observed that the reasoning in the following case is opposed to the distinction taken by Lord Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, falls under the same consideration as a servant under the like circumstances. 2 *East, P. C.* 503. The prosecutor, a Jew pedlar, came to the house of one Lewis, a publican, to stay all night, and fastened the door of his chamber. The prisoner pretended to Lewis that the prosecutor had stolen his goods, and under this pretence, with the assistance of Lewis and others, forced the chamber-door open, and stole the prosecutor's goods. Adams, B. doubted whether the chamber could be properly called the dwelling-house of the prosecutor, being really a part of the dwelling-house of the innkeeper. Upon a case reserved, the judges all thought, that though the prosecutor had for that night a special interest in the bedchamber, yet it was merely for a particular purpose, viz. to sleep there that night as a travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself, but both the property and possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in the room, even for the goods now in question, which he could not be unless that room were deemed to be in his possession; and that the landlord might go into the room when he pleased, and would not be a trespasser to his guest. *Prosser's case*, 2 *East, P. C.* 502.

Proof of the premises being a dwelling-house—occupation—partners.] Where one of several partners is the lessee of the premises where the business is carried on, and another partner occupies an apartment there and pays for his board and lodging, the latter, as already stated, will be considered as a lodger only. *Paminter's case*, 1 *Leach*, 537. (*n.*) *ante*, *p.* 269. But where the house is the joint property of the firm, and one of the partners, and the persons employed in the trade, live there, it is properly described as the dwelling-house of the firm. *Athea's case*, 1 *Moody, C. C.* 329.

Proof of the premises being a dwelling-house—out-buildings, and curtilage.] It has been already stated, that the dwelling-house at common law not only included the premises actually used as such, but also such out-buildings, &c. as were within

the curtilage or court-yard surrounding the house, and were consequently considered to be under the same protection. *Ante*, p. 261. Great difficulty being frequently experienced in deciding what buildings came within this protection, and very nice distinctions having been taken on the subject, (*see the cases collected*, 2 *East, P. C.* 492, 2 *Russell*, 13.) to remedy this evil, it was enacted by the 7 & 8 G. 4. c. 29. s. 13. that "no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, (or for any of the purposes aforesaid,) unless there shall be a communication between such building and dwelling-house either immediate or by means of a covered and inclosed passage leading from the one to the other."

The following case has been decided on this clause. The prosecutor's house consisted of two long rooms, another room used as a cellar, and washhouse on the ground-floor, and three bed-rooms up stairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back-yard. All the buildings were under the same roof. The prisoner broke into the washhouse, and the question reserved for the opinion of the judges was, whether this was burglary. Seven of their lordships thought that the washhouse was part of the dwelling-house, the remaining five thought it was not. *Burrowes's case*, 1 *Moody, C. C.* 274.

Proof of the offence having been committed in the night time.] The prosecutor must prove that both the breaking and entering took place in the night time, but is not necessary that both should have taken place on the same night. It is said by Lord Hale, that if thieves break a hole in the house one night, to the intent to enter another night, and commit a felony, through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 *Hale, P. C.* 551. This point was lately decided in the following case:—In the night of Friday, the side-door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night the prisoner entered through the hole thus made. On a case reserved, the judges were of opinion that the offence amounted to burglary, the breaking and entering being both by night. And although a day elapsed between the breaking and entering, yet the breaking was originally with intent to enter. *John Smith's case, Russ. & Ry.* 417.

With regard to what shall be esteemed *night*, it is said by Lord Hale to have been anciently held that, after sun-set,

though daylight be not quite gone, or before sun-rising, is *noctanter*, to make a burglary, (*Dalt. c.* 99. *Cromp.* 32. *b.*); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or *crepusculum*, it is not night. 1 *Hale, P. C.* 550. 3 *Inst.* 63. This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished. 1 *Hale*, 551. 4 *Bl. Com.* 224.

"If the breaking of the house," says Lord Hale, "were done in the day-time, and the entering in the night, or the breaking in the night and the entering in the day, that will not be burglary; for both make the offence, and both must be *noctanter*." 1 *Hale, P. C.* 551. *citing Cromp.* 33. *a. ex.* 8. *Ed.* 2. Upon this, the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter in the night at a hole in the wall which was there before, it is no burglary; but it does not appear who made the hole." 1 *Hale, P. C.* 551. (*n.*) It is observed by Mr. Serjeant Russell, that it is elsewhere given as a reason by Lord Hale, why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; and the learned writer adds, that "this reasoning, if applied to a breaking in the day-time and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering a burglary." 2 *Russell*, 32., *and see* 2 *East, P. C.* 509. It would seem, however, to be carrying the presumption much farther than in the case put by Lord Hale; and it may well be doubted, whether, in such a case, the offence would be held to amount to burglary.

Proof of intent—to commit felony—felony at common law, or by statute.] The prosecutor must prove that the dwelling-house was broken and entered with intent to commit a felony therein. Evidence that a felony was actually committed, is evidence that the house was broken and entered with intent to commit that offence. 1 *Hale, P. C.* 560. 2 *East, P. C.* 514.

It was at one time doubted, whether it was not essential that the felony intended to be committed should be a felony at common law. 1 *Hale, P. C.* 562. *Crompton*, 32. *Dalt. c.* 151. *s.* 5. But it appears to be now settled, according to the modern authorities, that it makes no difference whether the offence intended be felony at common law, or by statute; and the reason given is, that whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law. *Hawk. P. C. b.* 1. *c.* 38. *s.* 38. *Gray's case, Str.* 481. 4 *Bl. Com.* 228. 2 *East, P. C.* 511. 2 *Russ.* 35.

If it appear that the intent of the party, in breaking and entering, was merely to commit a trespass, it is no burglary; as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 *Hale, P. C.* 561. 2 *East, P. C.* 509. Where a servant embezzled money intrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. *Bingley's case, Hawk. P. C. b.* 1. *c.* 38. *s.* 37. *cited* 2 *Leach*, 840, *as Dingley's case*, 2 *East, P. C.* 510, *S. C. as Anon.* Where goods had been seized as contraband by an excise-officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and upon a case reserved, all the judges were of opinion that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavouring to get back the goods. *Knight & Roffey's case*, 2 *East, P. C.* 510. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made felony by statute 19 G. 2. c. 34., the chief baron and some of the other judges held it would have been burglary. But even in that case, some evidence must be given on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place would have been sufficient for this purpose. 2 *East, P. C.* 510. The prisoner was indicted for breaking, &c. with intent to kill and destroy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore-legs, from which he died. Pratt C. J. directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent its running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. *Dobb's case*, 2 *East, P. C.* 513. Two poachers went to the house of a game-keeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered; being indicted for this as a burglary, it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan B. directed an acquittal. *Anon. Matth. Dig. C. L.* 48. *See Holloway's case*, 5 *C. & P.* 524.

Proof of the intent—variance in the statement of.] The intent must be proved as laid. Thus, if it be laid with intent to commit one sort of felony, and it be proved that it was with intent to commit another, it is a fatal variance. 2 *East, P. C.* 514. Where the prisoner was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt, C. J. that this ought to have been so laid, and he directed an acquittal. *Vandercomb's case,* 2 *East, P. C.* 514. The property in the goods, which it is alleged were intended to be stolen, must be correctly laid, and a variance will be fatal. *Jenk's case,* 2 *East, P. C.* 514. It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent; 1 *Hale, P. C.* 560. 2 *East, P. C.* 514; and in such case no evidence except that of the committing of the offence will be required to show the intention. It is a general rule that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. Yet this it seems must be confined to cases where the offence intended is in itself a felony. 2 *East, P. C.* 514, 515.

The intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crow-bar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J. said, that it was for the jury to say, whether the prisoners went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that it was matter of observation that they had the opportunity, but did not commit the larceny, and he left it to the jury to say, whether from all the circumstances they could infer that or any other intent. *Anon. Lewin, C. C.* 37.

Minor offence—larceny, &c.] If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny, simple or compound, according to the circumstances of the case. Thus where the prisoner was charged with breaking and entering the house of the prosecutor, and stealing 60*l.* therein, and the jury found that he was not guilty of breaking and entering the house in the night, but that he was guilty of stealing the money in the dwelling-house; upon a case reserved, it was resolved by the judges after some doubt, that by this finding the prisoner was ousted of his clergy, for the indictment contained every charge necessary upon the 12 Ann, c. 7, viz. a stealing in a dwelling-house to

the amount of 40*s.*, and the jury had found him guilty of that charge. *Withal's case*, 2 *East*, *P. C.* 517, 1 *Leach*, 88. In a similar case the verdict given by the jury was "not guilty of burglary, but guilty of stealing above the value of 40*s.* in the dwelling-house," and the entry made by the officer was in the same words. On a case reserved, the judges held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "not guilty of the breaking and entering in the night, but guilty of the stealing," &c., as that was more distinct and correct. It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict "not guilty of murder, but guilty of manslaughter," or "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing. The judges added that the whole verdict must be taken together, and that the jury must not be made to say, that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge, or to appear to speak contradictorily by means of the officer's using a technical term, when the verdict is sensible and intelligible in itself. *Hungerford's case*, 2 *East*, *P. C.* 518.

It was formerly thought that if several were jointly indicted for burglary and larceny, and no breaking and entering were proved against one, he could not be convicted of larceny and the others of burglary. *Turner's case*, 1 *Sid.* 171, 2 *East*, *P. C.* 519. But in a late case, where one prisoner pleaded guilty, and the other two were found guilty of the larceny only, the judges on a case reserved differed in opinion. Seven of them resolved, that judgment should be entered against all the three prisoners, against him who had pleaded guilty for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J. and Hullock, B. were of a different opinion, but Hullock thought that if a *nolle prosequi* were entered as to the burglary, judgment might be given against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. *Butterworth's case*, *Russ. & Ry.* 520.

Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of the supposed burglary, he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said—"the indictment charges the prisoners with burglariously breaking and entering the house *and* stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced, goes to connect the prisoners with an antecedent felony committed before *three* o'clock, at which time it is clear, they had not entered the house. Having tried without effect to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said, that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present." *Vandercomb's case*, 2 *Leach*, 708.

Proof of breaking out of a dwelling-house.] It was formerly doubted whether, where a man entered a dwelling-house in the night (without breaking) with intent to commit felony, and afterwards broke out of the same, or being there in the night committed a felony, and broke out, this amounted to burglary or not. 1 *Hale, P. C.* 554, *Clarke's case*, 2 *East, P. C.* 490. *Lord Bac. Elem.* 65. 2 *Russ.* 7. It was, however, declared to be such by 12 Anne, c. 7, and that act being now repealed, it is declared by 7 & 8 Geo. 4. c. 29. s. 11, that if any person shall enter the dwelling-house of another with intent to commit a felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night time, such person shall be deemed guilty of burglary.

Proof upon plea of autrefois acquit.] In considering the evidence upon the plea of *autrefois acquit* in burglary, some difficulty occurs from the complex nature of that offence, and from some contrariety in the decisions. The correct rule appears to be, that an acquittal upon an indictment for burglary in breaking and entering and *stealing goods*, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night *with intent to steal*, on the ground that the several offences described in the two indictments cannot be said to be the same. This rule was established in *Vandercomb's case*, where Buller J. delivered the resolution of the judges, and concluded in these words:—"These cases establish

the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply these principles to the present case. The first indictment was for burglariously breaking and entering the house of Miss Neville, and *stealing* the goods mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of Miss Neville *with intent to steal*, which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad, and that the prisoners must take their trials upon the present indictment." *Vandercomb's case*, 2 *Leach*, 716, 2 *East*, *P. C.* 519, overruling *Turner's case*, *Kel.* 30, *and Jones & Bever's case*, *Id.* 52.

CATTLE.

OFFENCES WITH REGARD TO CATTLE.

Stealing horses, cows, sheep, &c. . . . 284
Killing cattle with intent to steal . . 286
Maiming cattle 286
Proof of the animal, being within the stat. . 287
Proof of the injury . . . 287
Proof of the malice and intent . . 288

Offences with regard to cattle—stealing horses, cows, sheep, &c.] The stealing of domestic animals, as horses, cows, sheep, &c. was larceny at common law, and the punishment of persons so offending was likewise provided for by various statutes now repealed, the 7 & 8 Geo. 4. c. 29, being substituted in their place.

By the 25th section of that statute it is enacted, that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcase, or skin, or any part of the cattle so killed, every such

offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. But by the 2 & 3 Wm. 4. c. 62, s. 1, the above act, so far as regards the punishment of the offender, is repealed, and it is enacted that every person convicted of such felonies, or of counselling, aiding, or abetting the commission thereof, shall be transported beyond the seas for life. And by 3 & 4 Wm. 4. c. 64, s. 3, such offender may, previous to his being transported, be imprisoned with or without hard labour in the common gaol or house of correction, or be confined in the penitentiary for any term not exceeding four years, nor less than one year.

To support a prosecution under this statute for stealing a horse, &c., the prosecutor must give the same evidence, in general, as would be required to maintain an indictment for larceny at common law.

From the peculiar nature of the property, a doubt sometimes arises with regard to the *animus furandi* in cases of horse-stealing; it being uncertain whether the horse was taken with an intent to steal, or merely to facilitate the escape of the party with other stolen property.

The least removal in this, as in other cases of larceny, will be sufficient, though part only of the animal be taken. The prisoner was indicted for stealing six lambs, and the evidence was that the carcases of the lambs without their skins, were found on the premises where they had been kept, and that the prisoner had sold the skins the morning after the offence was committed. The jury having found the prisoner guilty, a doubt arose whether, as the statute 14 G. 2. c. 6. (now repealed) specifies feloniously driving away, and feloniously killing, with intent to steal, the whole or any part of the carcase, as well as feloniously stealing in general, although there must in such cases be some removal of the thing, it did not intend to make these different offences; but the judges held the conviction right, for any removal of the thing feloniously taken constitutes larceny. *Rawlins's case*, 2 *East*, *P. C.* 617. The authority of this case, however, so far as the circumstances were held to apply to the rule with regard to the removal of the property, was much shaken in the following:—The prisoner was tried upon an indictment (under 14 G. 2.) charging him in one count with stealing, and in another with killing, three sheep, with intent to steal the whole of the carcases. The sheep were in the field of the prosecutor on the evening of the 4th May, and the next morning were found killed and cut open, the inside and entrails taken out, and the tallow and inside fat taken away; the fat cut off the back of two of them was taken away, but the fat on the back of the third was left. The carcases of the sheep were found lying in the gripe of the hedge, in the same field where the live sheep had been; the entrails were also left, and found in an adjoining field. With regard to the count

for stealing, Littledale, J. observed, that in all cases, in which a slight removal of the article had been held to amount to larceny, there had always been an intent to steal the article itself, but the thief had been prevented from getting the complete possession and dominion over it; and if it was not held larceny, there would be a failure of public justice. But here there was no intention, in the removal, to drive away or steal the living sheep; but the intent of the removal was to commit another offence, of which he might be capitally convicted. In all the cases where a slight removal had been held larceny, there was evidence given of an actual removal, and how it was done; but here there was no evidence of the removal of the sheep in a live state, and the removal after their death would not support a count for stealing *sheep*, which must be intended to be live sheep. (*Edwards's case, Russ. & Ry.* 497.) The doctrine in *Rawlins's case, supra*, not being satisfactory to the mind of the learned judge, he reserved the case for the opinion of the judges, who were of opinion that the second count was supported, and not the first, a removal whilst alive being essential to constitute larceny; and nine of the judges held that the offence of intending to steal a part, was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole or only to part. *Williams's case*, 1 *Moody, C. C.* 107.

With regard to the description of the animal stolen, &c., the cases have already been stated. *See ante.*

Killing cattle, with intent to steal.] Upon an indictment under the 7 & 8 G. 4. c. 29. s. 25, for killing cattle with intent to steal the carcase or skin, or any part of the cattle so killed, the prosecutor must prove the killing and the intent.

Upon an indictment for killing a sheep with intent to steal the whole carcase, it is sufficient to prove a killing with intent to steal a part only. *Williams's case*, 1 *Moody, C. C.* 107, *supra*. Where the prisoner was indicted for killing a lamb, with intent to steal part of the carcase, and it appeared that the prisoner cut off the leg of the animal while living, and carried it away before it died, the judge thought that as the death-wound was given before the theft, the offence was made out, and the prisoner being convicted, on a case reserved, the judges were unanimously of opinion that the conviction was right. *Clay's case, Russ. & Ry.* 387.

Maiming, &c. of cattle.] At common law, the maiming of cattle was not an indictable offence. The prisoner was charged for that he, on &c., with force and arms, one gelding, of the value, &c., then and there unlawfully did maim, to the damage of the prosecutor; but, upon a reference to the judges after conviction, they all held that the indictment contained no

indictable offence; for, if the case were not within the Black Act, the fact in itself was only a trespass; for the words *vi et armis* did not imply force sufficient to support the indictment. *Ranger's case*, 2 *East*, *P. C.* 1074.

This class of offences was provided against by the Black Act, 9 Geo. 1. c. 22; but that statute was repealed, and in substance re-enacted, by the 4 Geo. 4. c. 54; and now, the latter statute being also repealed, by the 7 & 8 Geo. 4. c. 27, the law on this subject is contained in the 7 and 8 Geo. 4. c. 30.

By the 16th sect. of that statute, it is enacted, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall think fit) in addition to such imprisonment.

The evidence upon a prosecution under this statute will be—1, that the animal killed or maimed comes within the description of cattle specified in the statute; and 2, the act of killing or maiming by the prisoner.

Proof of the animal being within the statute.] Upon the repealed statute of 9 Geo. 1. c. 22, which only contained the general word "cattle," it was held, that an indictment for killing "a mare" was good. *Paty's case*, 1 *Leach*, 72, 2 *W. Bl.* 721, 2 *East*, *P. C.* 1074. And so an indictment for wounding "a gelding." *Mott's case*, 1 *Leach*, 73, (*n.*) Pigs have been held to be within the stat. 9 Geo. 1. c. 22. *Chapple's case*, *Russ. & Ry.* 77. So also asses. *Whitney's case*, 1 *Moody*, *C. C.* 3. It is not sufficient in the indictment to charge the prisoner with maiming, &c. "cattle" generally, without specifying the description, and such description must be proved; and where the sex is stated, the animal must be proved to be of that sex. *Chalkley's case*, *Russ. & Ry.* 258.

Proof of the injury.] Upon an indictment for maliciously *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. Upon an indictment for this offence, it was proved that the prisoner had maliciously driven a nail into a horse's foot. The horse was thereby rendered useless to the owner, and continued so to the time of trial; but the prosecutor stated that it was likely to be perfectly sound again in a short time. The prisoner being convicted, the judges, on a case reserved, held the conviction right, being of opinion that the word "wounding" did not imply a permanent injury. *Haywood's case*, *Russ. & Ry.* 16, 2 *East*,

P. C. 1076. But by *maiming*, is to be understood a permanent injury. *Id.* 2 *East, P. C.* 1077.

Where the prisoner was indicted on the 4 Geo. 4. c. 54, for wounding a sheep, and it appeared that he had set a dog at the animal, and that the dog, by biting it, inflicted several severe wounds, Park, J., is stated to have said, "This is not an offence at common law, and is only made so by a statute, and I am of opinion that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute." *Hughes's case*, 2 *C. & P.* 420. As to the construction of the word "wound," see *Wood's case*, 1 *Moody, C. C.* 278, *Wetton's case*, *Id.* 294. Where the prisoner poured a quantity of nitrous acid into the ear of a mare, some of which, getting into the eye, produced immediate blindness, being convicted of maliciously maiming the mare, the conviction was held by the judges to be right. *Owen's case*, 1 *Moody, C. C.* 205.

The administering poison to cattle, however malicious the act may be, is not a felony within the statute, unless the animal die; but the party may be indicted as for a misdemeanor. Where a man was thus indicted, for administering sulphuric acid to eight horses, with intent feloniously to kill them, and it appeared that he had mixed sulphuric acid with the corn, and having done so gave each horse his feed; Park, J., held that this evidence supported the allegation in the indictment, of a joint administering to all the horses. *Mogg's case*, 4 *C. & P.* 364.

Where the prisoner set fire to a cowhouse, and a cow in it was burnt to death, Taunton, J., ruled that this was a killing of the cow, within the 7 & 8 Geo. 4. c. 30. s. 16. *Haughton's case*, 5 *C. & P.* 559.

Proof of malice and intent.] Under the repealed statute of 9 G. 1. c. 22, it was necessary to show that the act was done out of malice to the owner; but the 7 & 8 Geo. 4. c. 30, renders it an offence, whether the act be done from malice conceived against the owner or otherwise. Although it is thus rendered unnecessary to give evidence of malice against any particular person, yet an evil intent in the prisoner must appear. Thus, in *Mogg's case, supra*, Park, J. left it to the jury to say whether the prisoner had administered the sulphuric acid (there being some evidence of a practice of that kind by grooms) with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of his horses; and that in the latter case they ought to acquit him.

CHALLENGING TO FIGHT.

What amounts to 289
Proof of intent 289
Venue 289

What amounts to.] It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to provoke another to send such a challenge, or to fight, as by dispersing letters to that purpose, containing reflections, and insinuating a desire to fight. *Hawk. P. C. b.* 1. *c.* 63. *s.* 3. Thus, a letter containing these words, "You have behaved to me like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," was held indictable. *Phillips's case*, 6 *East*, 464. *Rice's case*, 3 *East*, 581.

On an indictment for challenging, or provoking to challenge, the prosecutor must prove—1st, the letter or words conveying the challenge; and 2d, where it does not appear from the writing or words themselves, he must prove the intent of the party to challenge, or to provoke to a challenge.

Proof of the intent.] In general the intent of the party will appear from the writing or words themselves; but where that is not the case, as where the words are ambiguous, the prosecutor must show the circumstances under which they were uttered, for the purpose of proving the unlawful intent of the speaker. Thus, words of provocation, as "liar," or "knave," though a *mediate* provocation to a breach of the peace, do not tend to it *immediately*, like a challenge to fight, or a threatening to beat another. *King's case*, 4 *Inst.* 181. Yet these, or any other words, would be indictable if proved to have been spoken with an intent to urge the party to send a challenge. 1 *Russell*, 276.

Venue.] Where a letter challenging to fight is put into the post-office in one county, and delivered to the party in another, the venue may be laid in the former county. If the letter is never delivered, the defendant's offence is the same. *Williams's case*, 2 *Campb.* 506.

CHEATING.

Proof of the nature of the cheating or fraud—affecting the public 290
What cheats are not indictable 292

Under this head, the evidence required to support an indictment for a cheat or fraud at common law will be considered. The proofs regarding prosecutions for false pretences, are treated of in a subsequent part of this work.

In order to support an indictment at common law for cheating, the prosecutor must prove—1st, that the cheat was of a public nature; 2d, the mode in which the cheating was effected; thus if it was by a false token, the nature of such false token must be stated in the indictment, and proved in evidence; 3d, that the object of the defendant in defrauding the prosecutor was successful.

The punishment of this offence is, as in cases of other misdemeanors at common law, fine and imprisonment.

Proof of the nature of the cheating or fraud—affecting the public.] Frauds affecting the crown, and the public at large, are indictable, though they may arise in the course of particular transactions with private individuals. 2 *Russell*, 285. The selling unwholesome provisions, 4 *Bl. Com.* 162, or the giving any person unwholesome victuals, not fit for man to eat, *lucri causâ*, 2 *East*, *P. C.* 822, is an indictable offence. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected in arrest of judgment that the indictment could not be sustained, for that it did not appear that what was done was in breach of any contract with the public, or of any civil or moral duty; but the judges, on a reference to them, held the conviction right. *Treeve's case*, 2 *East*, *P. C.* 821. The defendant was indicted for supplying the Royal Military Asylum at Chelsea, with loaves not fit for the food of man, which he well knew, &c. It appeared that many of the loaves were strongly impregnated with alum, (prohibited to be used by 37 G. 3. c. 98. s. 21.) and pieces as large as horse-beans were found; the defence was, that it was merely used to assist the operation of the yeast, and had been carefully employed. But Lord Ellenborough said, "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the

bread in that injurious form, although if equally spread over the mass, it would have done no harm." *Dixon's case*, 4 *Camph.* 12, 3 *M. & S.* 11.

There is also another head of public cheats indictable at common law, which are directed against the public justice of the kingdom; such as the doing judicial acts without authority, in the name of another. 2 *East, P. C.* 821. There is the precedent of an indictment against a married woman for pretending to be a widow, and as such, executing a bail-bond to the sheriff. This probably was considered a fraud upon a public officer in the course of justice. *Ibid. Trem. P. C.* 101. *Cr. Cir. Com.* 78. So it was said by Lord Ellenborough, that he had not the least doubt that a person making use of a false instrument for the purpose of perverting the course of justice, was guilty of an offence punishable by indictment. *Omealy v. Newell*, 8 *East*, 364. So it was held, that a person who, being committed under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, although the attachment not being for non-payment of money, the discharge was a nullity. *Fawcett's case*, 2 *East, P. C.* 862. Doubts were entertained by some of the judges whether this was not a forgery at common law. *Vide post, title "Forgery."*

Fraudulent malversations or cheats in public officers, are also the subject of an indictment at common law, as against overseers of the poor for refusing to account; *Commings' case*, 5 *Mod.* 179, 1 *Bott*, 332, 1 *Russell*, 288; or for rendering false accounts. *Martin's case*, 2 *Campb.* 269, 3 *Chitty, C. L.* 701, 2 *Russell*, 288. Upon an application to the Court of King's Bench, against the minister and churchwardens of a parish, for misapplying monies collected by a brief, and returning a smaller sum only as collected, the Court, refusing the information, referred the prosecutors to the ordinary remedy by indictment. *R. v. Ministers, &c. of St. Botolph*, 1 *W. Bl.* 443. *Vide post, title "Offices."*

Again, where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such a way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the Court decided otherwise, as it related to the public revenue. *Bembridge's case, cited* 6 *East*, 136.

Another class of frauds affecting the public, is cheating by false weights and measures, which carry with them the semblance of public authenticity. Thus, the counterfeiting the general seal or mark of a trade upon cloth of a certain description and quality, is indictable. *Worrel's case, Trem. P. C.* 106, 2 *East, P. C.* 820. So where the defendant has measured corn in a bushel, and put something in the bushel to fill it

up, or has measured it in a bushel short of the stated measure. *Per Cur. Pinkney's case*, 2 *East, P. C.* 820.

What cheats are not indictable.] It is not, however, every species of fraud and dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law; but in order to constitute it such, it must be an act affecting the public, such as is public in its nature, calculated to defraud numbers, and to deceive the people in general. 2 *East, P. C.* 816.

Where an imposition upon an individual is effected by a false affirmative or bare lie, in a matter not affecting the public, an indictment is not sustainable. Thus where an indictment charged the defendants with selling to a person eight hundred weight of gum, at the price of seven pounds per hundred weight, falsely affirming that the gum was gum *seneca*, and that it was worth seven pounds per hundred weight, whereas it was not gum *seneca*, and was not worth more than 3*l.* &c., the indictment was quashed. *Lewis's case, Sayer*, 205.

So where the party accompanies his assertion with an apparent token of no more value than his own assertion. Thus, where an indictment at common law charged that Lara, deceitfully intending, by crafty means and devices, to obtain possession of divers lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him (Lara) &c., purporting to be a draft upon his banker for the amount, which he knew he had no authority to do, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained the tickets, and defrauded the prosecutor of the value; judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit, for the banker's check drawn by himself entitled him to no more credit than his bare assertion that the money would be paid. *Lara's case*, 2 *East, P. C.* 819, 6 *T. R.* 565, 2 *Leach*, 652. But such an offence is punishable as a *false pretence* under the statute. *Vide post, title "False Pretences."* So where the defendant, a brewer, was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter assuring him that they did contain such a measure, when, in fact, they did not contain such measure, but so much less, &c., the indictment was quashed on motion, as containing no criminal charge. *Wilders's case, cited* 2 *Burr.* 1128, 2 *East, P. C.* 819. Upon the same principle, where a miller was indicted for detaining corn sent to him to be ground, the indictment was quashed, it being merely a private injury, for which an action would lie. *Channell's case,*

2 *Str.* 793, 1 *Sess. Ca.* 366, 2 *East, P. C.* 818. So, selling sixteen gallons of ale as eighteen—Lord Mansfield said, "it amounts only to an unfair dealing, and an imposition on this particular man, from which he could not have suffered but for his own carelessness in not measuring the liquor when he received it; whereas fraud, to be the object of a criminal prosecution, must be of that kind, which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy." *Wheatly's case*, 2 *Burr.* 1125, 1 *W. Bl.* 273, 2 *East, P. C.* 818. Where a miller was charged with receiving good barley, and delivering meal in return different from the produce of the barley, and musty, &c., this was held not to be an indictable offence. Lord Ellenborough said, that if the case had been, that the miller had been owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Wheatly's case*, (*supra*) and the other cases, as not being indictable. *Haynes's case*, 4 *M. & S.* 214. *Vide Wood's case*, 1 *Sess. Ca.* 217, 2 *Russell*, 296.

The indictment stated that the defendant came to M. in the name of J., to borrow 5*l.*, on which M. lent her the 5*l.*, *ubi revera* she never had any authority from J. to borrow the money. The defendant being convicted, on motion in arrest of judgment, the whole Court thought this not an indictable offence. Holt C. J. put the following case:—A young man seemingly of age, came to a tradesman to buy some commodities, who asked him if he was of age, and he told him he was, upon which he let him have the goods, and upon an action, he pleaded *infra ætatem*, and was found to be under age half a year; and afterwards the tradesman brought an action upon the case against him for a cheat; but after a verdict for the plaintiff, judgment was arrested. Powell J., said, if a woman pretending herself to be with child, does with others conspire to get money, and for that purpose goes to several young men, and says to each that she is with child by him, and that if he will not give her so much money, she will lay the bastard to him, and by these means gets money of them, this is indictable. Holt C. J. added, "I agree it is so when she goes to several, but not to one particular person." *Glanvill's case*, *Holt*, 354. From the last observation of Holt C. J., it appears that Powell J. was speaking of an indictment for *cheating*, and not, as might be supposed, from using the words, "does with others conspire," of an indictment for conspiracy.

CHILD STEALING.

The offence of child-stealing is now provided against by the statute 9 G. 4. c. 31. s. 21. by which it is enacted, That if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of 10 years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned with or without hard labour in the common gaol or House of Correction, for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment. Provided always, that no person, who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

To support an indictment under this statute, the prosecutor must prove—1. The leading or taking away, decoying or enticing away of the child, either by force or fraud, as alleged in the indictment. Where the child is not produced as a witness, or is of such tender years as to be unable to give evidence, the taking or decoying, &c. must be proved by the other circumstances of the case. 2. The age of the child. It must be proved that the child is not more than ten years of age; but the precise age mentioned in the indictment is not material. 3. The intent must be proved as laid, and will in general be gathered from all the circumstances of the case. An intent to deprive the parents, &c. of the lawful care or charge of the child may be inferred, from the secret manner in which it was taken away. As to the "persons having the lawful care or charge of the child," *vide ante, title "Abduction," p.* 197.

CONCEALING BIRTH OF CHILD.

The offence of concealing the birth of a child was first provided against by statute 21 Jac. 1. c. 27, which was repealed

by the 43 G. 3. c. 58. The latter statute was also repealed by the 9 G. 4. c. 31, which contains the following clause, (s. 14.) —That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth; provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence, as if she had been convicted upon an indictment for the concealment of the birth.

Upon a prosecution on this statute, the prosecutor must prove, 1, the birth of the child; 2, the secret burying, or other disposal of the dead body; and 3, the endeavour to conceal the birth. In general, the evidence to prove the first points will also tend to establish the last.

In defence, the prisoner may prove any circumstances negativing the endeavour to conceal, as that she called for help or confessed herself with child; and upon the same principle evidence was allowed (under the repealed statute 21 Jac. 1. c. 27.) of the mother's having made provision for the birth, as a circumstance to show that she did not intend to conceal it. 1 *East, P. C.* 228. A disclosure to an accessory has been held to take the case out of the stat. 21 Jac. 1. Jane Peat was indicted for the murder of her bastard child, and Margaret Peat, her mother, for being present, aiding and abetting. It appeared that Jane Peat was heard by persons in an adjoining room to call her mother. Heath, J. ruled, that if any person was present, though privy to the guilt, the case was not within the statute. *Peat's case*, 1 *East, P. C.* 229. The prisoner was indicted for the murder of her bastard child, and it was proved that she had thrown the child down the privy. The learned judge told the jury, that the act of throwing the child down the privy was evidence of an endeavour to conceal the birth, within the 43 G. 3. c. 58. s. 3. (now repealed), and the prisoner being convicted of the endeavour to conceal, the judges held that the conviction was right. *Cornwall's case, Russ. & Ry.* 336. Where the dead body of a new born child was found amongst the feathers of a bed, and there was no evidence showing by whom it was put there, and it appeared that the mother had sent for a surgeon, and prepared clothes, the judge, on an

indictment against the mother for endeavouring to conceal the birth, directed an acquittal. *Higley's case*, 4 *C. & P.* 366.

An indictment for endeavouring to conceal the birth of a child must show that the child was dead, but whether it died before or after the birth need not be proved. *Perkins's case*, *Lewin*, *C. C.* 44. So it was said by Bayley, J., that he should rule that the statute 43 Geo. 3. c. 58. extended to all cases, whether it was proved that the child was still born, or left the matter in doubt. *Southern's case*, 1 *Burn*, 335, 24*th Ed.*

Upon an indictment for the murder of the child, the prisoner, on failure of the proof as to the murder, may be convicted by the statute of endeavouring to conceal the birth. Where the bill for murder was not found by the grand jury, and the prisoner was tried for murder on the coroner's inquisition, it was held that she might be found guilty of the concealment, the words of the stat. 43 Geo. 3. being that "it shall be lawful for the jury, by whose verdict any person *charged* with such murder shall be acquitted, to find," and the judges holding that the coroner's inquisition was a *charge*, so as to justify the finding of the concealment. *Maynard's case*, *Russ. & Ry.* 240. *Cole's case*, 2 *Leach*, 1095, 3 *Campb.* 371. It may be observed, that the word *charge* does not occur in the statute 9 G. 4. c. 31.

COINING.

Proof of counterfeiting the gold and silver coin . 297
Proof of the counterfeiting . . 297
Proof that the coin is counterfeit . . 298
Proof of colouring counterfeit coin or metal—and filing, and altering legal coin . . 299
Proof of impairing or diminishing the coin . . 300
Proof of uttering counterfeit gold or silver coin . 300
Proof of the simple uttering . . 301
Proof of the compound offence of uttering, having other counterfeit coin in possession . 301
Proof of buying or selling counterfeit coin for less value than its denomination—importing counterfeit coin . . . 303
Proof of having counterfeit coin in possession . 304
Proof of counterfeiting, &c. the copper coin . 304

Proof of counterfeiting foreign coin . . 305
Proof of uttering foreign counterfeit coin . . 306
Proof of having in possession five or more pieces of foreign counterfeit coin . . . 307
Proof of offences with regard to coining tools . 308
Venue 310
Traversing 310
Accessories 310
Interpretation clause 310

The laws against coining, so far as they relate to the current coin of the realm, were consolidated by the 2 W. 4. c. 34. by which the former statutes were repealed, and new provisions substituted.

Proof of counterfeiting the gold or silver coin.] By the 2 W. 4. c. 34. s. 3. it is enacted, that if any person shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

In order to establish the charge of counterfeiting, the prosecutor must prove—1st, the act of counterfeiting—and 2d, that the coin counterfeited resembled, or was apparently intended to resemble or pass for the king's current gold or silver coin.

Counterfeiting the gold or silver coin—proof of the counterfeiting.] In order to prove that the prisoner was guilty of counterfeiting, it is not necessary to show that he was detected in the act, but presumptive evidence, as in other cases, will be sufficient, *viz.* that false coin was found in his possession, and that there were coining tools discovered in his house, &c. But the evidence must be such as to lead to a plain implication of guilt. Two women were indicted for colouring a shilling and a six-pence, and the third prisoner, a man, for counselling them, &c. It appeared that he had visited them once or twice a week; that the rattling of copper money had been heard whilst he was with them, that on one occasion he was seen counting something after he came out; that he resisted being stopped,

and jumped over a wall to escape; and that there were found upon him a bad three shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought this evidence too slight to support a conviction. *Isaac's case*, 1 *Russell*, 62.

Counterfeiting the gold or silver coin—proof that the coin is counterfeited.] It must be proved both that the coin in question is counterfeit, and that it resembles, or is apparently intended to resemble the king's current gold or silver coin. The fact that the coin counterfeited or resembled, is the king's current gold or silver, may be proved by evidence of common usage or reputation. 1 *Hale, P. C.* 213. The proof that the coin in question is in fact false, is provided for by the 17th sect. of the 2 W. 4. c. 34. which enacts, That where, upon the trial of any person charged with any offence against the act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of his majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

In proving the coin to be counterfeit, two questions may arise; first, whether it is in such a state of completion as to be properly described as false and counterfeit *coin;* and secondly, whether it does resemble or is apparently intended to resemble or pass for the king's current gold or silver coin.

With regard to the first question, it is enacted by the 2 W. 4. c. 34. s. 3. that the offence of counterfeiting shall be deemed to be complete, although the coin so made or counterfeited shall not be in fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. Notwithstanding this provision, there must still, it is apprehended, be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The clause appears to have been intended to provide against such cases as that of Harris, where the metal requiring a process of beating, filing, and immersing in *aqua fortis*, to render the coin passable, the judges held that the prisoner could not be convicted of counterfeiting. *Harris's case*, 1 *Leach*, 135. *See also Varley's case*, 1 *Leach*, 76, 2 *Wm. Black.* 682, 1 *East, P. C.* 164.

The question whether the coin alleged to be counterfeit does in fact resemble or is apparently intended to resemble or pass for the king's current gold or silver coin, is one of fact for the jury, in deciding which they must be governed by the state of the coinage at the time. Thus where the genuine coin is worn smooth, a counterfeit bearing no impression is within the law, for it may deceive the more readily for bearing no impression,

and in the deception the offence consists. *Welsh's case*, 1 *East, P. C.* 164, 1 *Leach*, 293. *Wilson's case*, 1 *Leach*, 285. Nor will a variation not sufficient to prevent the deception render the coin less a counterfeit. Thus it is said by Lord Hale, that counterfeiting the lawful coin of the kingdom, yet with some small variation in the inscription, effigies, or arms, is a counterfeiting of the king's money. 1 *Hale, P. C.* 215.

Proof of colouring counterfeit coin or metal — and filing, and altering legal coin.] By section 4. of 2 W. 4. c. 34, it is enacted, that if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour or case over any coin whatsoever, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin; or if any person shall gild, or shall, with any wash or materials capable of producing the colour of gold, wash, colour, or case over any of the king's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold coin; or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or silver, wash, colour, or case over any of the king's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

The act of gilding, or silvering, or colouring, or washing, must be proved; and in the latter case, it must appear that the wash or materials were *capable* of producing the colour of gold or silver. The words of the former statute were, "with any wash or materials *producing* the colour, &c." Doubts arose upon the effect of these words, where the colour of gold or silver had not been actually produced, but the coin wanted some further operation to fit it to be passed. *Case's case*, 1 *East, P. C.* 165, 1 *Leach*, 154. (*n.*) *Lavey's case*, 1 *Leach*, 153, 1 *East, P. C.* 166. The doubts, however, cannot exist upon an indict-

ment under the 2 W. 4. which makes it immaterial whether the colour has been in fact produced. The act of colouring may be proved by evidence that coin so coloured was found in the prisoner's house, or had been procured there, and that the wash or materials required for the purpose were discovered in his possession.

Proof of impairing or diminishing the coin.] By 2 W. 4. c. 34. s. 5. if any person shall impair, diminish, or lighten, any of the king's current gold or silver coin, with intent to make the same so diminished, impaired, or lightened, pass for the king's current gold or silver coin, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years.

The act of diminishing or impairing, if not shown by direct evidence, may be proved by circumstances, as showing that the prisoner had diminished coin in his possession, and also filings, &c. The intent to pass such coin must then be proved, and if found upon his person, it would be a question for the jury to say whether he did not intend to pass it.

Proof of uttering counterfeit gold or silver coin.] The various offences, with regard to the uttering false gold or silver coin, are comprised within the 7th section of the 2 W. 4. c. 34, by which it is enacted, that if any person shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and

Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years.

Proof of uttering counterfeit gold or silver coin—evidence of the simple uttering.] Upon an indictment for the simple offence of uttering, the prosecutor must prove the act of uttering, &c. as charged, that the money was counterfeit, and that the prisoner knew it to be such. The practice of "ringing the changes" was held to be an offence under the repealed statute, 15 Geo. 2. c. 28; *Frank's case*, 2 *Leach*, 644.; and it is so likewise under the present act. The coin must be proved to be counterfeit in the usual way. The mode of proving guilty knowledge has been already considered at length. *Ante*, *p.* 66.

Where several persons are charged with an uttering, it must appear either that they were all present, or so near to the party actually uttering, as to be able to afford him aid and assistance. Where three persons were indicted for uttering a forged note, and it appeared that one of them uttered the note in Gosport while the other two were waiting at Portsmouth, till his return, it having been previously concerted that the prisoner who uttered the note should go over the water for the purpose of passing the note, and should rejoin the other two; all the prisoners having been convicted, it was held that the two prisoners who had remained in Portsmouth not being present at the time of uttering, or so near, as to be able to afford any aid or assistance to the accomplice who actually uttered the note, were not principals in the felony. *Soares's case*, *Russ. & Ry.* 25, 2 *East*, *P. C.* 974. The two prisoners were charged with uttering a forged note. It appeared that they came together to Nottingham, and left the inn there together, and that on the same day, between two and three hours from their leaving the inn, one of the prisoners passed the note; both the prisoners being convicted, the judges held the conviction wrong as to the prisoner who was not present, not considering him as present aiding and abetting. *Davis's case*, *Russ. & Ry.* 113.

Proof of uttering counterfeit gold or silver coin—evidence of the compound offence of uttering, having other counterfeit coin in possession.] Where the charge is for the compound offence, the

prosecutor must prove, in addition to the evidence required to support the charge of simply uttering, that the prisoner had, at the time of the tendering, other counterfeit coin in his possession. The statute does not require that an intent to pass the latter coin should be proved. The nature of the possession is explained by the interpretation clause of the new statute. *Vide post, p.* 310. The following cases arose, with regard to this point, upon the repealed statute, 15 G. 2. c. 28. s. 3. A man and a woman were jointly indicted for uttering a counterfeit shilling, having about them, &c. another counterfeit shilling, knowing, &c. It appeared that they came together to a public-house, and the woman, in the absence of the man, paid away the counterfeit shilling; that on the same day the man went to another public-house and offered to sell a large quantity of counterfeit shillings; and that on the following day the prisoners were apprehended while in bed. Near the bed was found a quantity of bad halfpence, some silver (four shillings and sixpence) in the man's pocket, which was good, and one shilling and sixpence bad; and concealed under his arm was found a paper parcel of bad shillings, which, if good, would have been worth 14*l.*; in the woman's pocket were found a good half-crown, seven good shillings, and six counterfeit shillings, like the counterfeits found in the paper under the man's arm. Upon this evidence it was insisted for the prisoners that there was no ground to convict the man, he not having uttered the shilling, nor being present at the time the woman uttered it. With respect to the woman, she could only be convicted of the simple offence of uttering the shilling, it not appearing that, at the time of uttering it, she had any other counterfeit money about her. Both the prisoners being convicted, the judges held the conviction of the woman for the single offence good, but not good for uttering and having about her at the time other money; and as to the conviction of the man, they held it could not be supported. *Else's case, Russ. & Ry.* 142. In the following case, two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop and there purchased a loaf, for which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was found upon her. The other prisoner who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found on her, wrapped in gauze paper. It was objected that the complete offence stated in the indictment was not proved against either of the prisoners, and the above case of *R. v. Else* was cited. Garrow, B., was of opinion that the two prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say, whether the possession of the

remaining pieces of bad money was not joint. The jury found both the prisoners guilty. *Skerrit's case*, 2 *C. & P.* 427.

By 2 W. 4. c. 34. s. 9. where any person [who] shall have been convicted of any offence against this act, shall afterwards be indicted for any offence against this act, committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same.

Proof of buying or selling counterfeit coin for less value than its denomination—importing counterfeit coin.] By the 2 W. 4. c. 34. s. 6. it is enacted, that if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the United Kingdom from beyond the seas any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

The words of this clause are intended to include all the acts of persons who *deal* in false coin. Under the former statute (8 & 9 W. 3. c. 26. s. 6.) it was held, that a mere *offer* to put off false money was not indictable; *Wooldridge's case*, 1 *Leach*, 307, 1 *East*, *P. C.* 179.; but such an offence is provided for by the new act.

The prosecutor must prove that the money put off, &c. was counterfeit, and must show that it was put off, &c. as stated in the indictment. The averment, with regard to the mode of putting off, &c. is considered as the allegation of a contract, and must be proved as laid. Therefore the names of the persons to whom the putting off, &c. took place, must be proved; and if it was to persons unknown, the same rule applies as in the case of stealing the goods of a person unknown. 1 *East*, *P. C.* 180. So the price alleged to be given for the false coin must be proved. Where the indictment stated, that five counterfeit shillings were put off at two shillings, and the proof was that they were put off

at half-a-crown, it was held a variance, and the prisoner was acquitted. *Joice's case*, 3 *C. & P.* 411. (*n.*) *Carr. Supp.* 184, 1*st ed.* But where the prisoner was charged with putting off a counterfeit sovereign and three counterfeit shillings for the sum of five shillings, and the evidence was that the prisoner said the purchaser should have a sovereign at four shillings, and three shillings at one shilling, and the purchaser paid in two good half-crowns, it was held all one transaction, and no variance. *Hedge's case*, 3 *C. & P.* 410.

Proof of having possession of counterfeit coin.] By the 2 W. 4. c. 34. s. 8. it is enacted, that if any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor or crime and offence, such person shall be deemed guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding three years.

The prosecutor must prove, 1, the possession of the false coin, 2, the guilty knowledge, and, 3, the intent to utter or put off the same.

The nature of the possession required to constitute the offence is explained by the interpretation clause (s. 21.) of the 2 W. 4. c. 34. *Post*, *p.* 310.

The guilty knowledge will be proved in the same manner as under an indictment for uttering false coin. *Ante*, *p.* 301.

The intent to utter must be proved from circumstances; amongst the most cogent of which will be, the fact that upon other occasions the prisoner has uttered false coin.

Where the prisoner is indicted as for a felony, for having in his custody or possession three or more pieces of counterfeit coin, after a previous conviction for the misdemeanor, in addition to the above proofs, evidence must be given of the previous conviction, and of the identity of the parties, according to the 9th section of the statute. *Ante*, *p.* 303.

Proof of counterfeiting, &c. the copper coin.] By the 12th section of the 2 W. 4. c. 34, the various offences relating to the copper coin are consolidated into one clause, and it is enacted, that if any person shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass

for any of the king's current copper coin, or if any person shall knowingly, and without lawful authority, (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, knowingly, and without lawful excuse, (the proof of which excuse shall lie on the party accused,) have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the king's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king s current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year.

The evidence upon indictments for offences in counterfeiting or uttering the copper coin, is in general the same as upon indictments for similar offences against the gold or silver coin. It must appear, however, where the charge is for counterfeiting the copper coin, that it was in a fit state to be uttered, the third section of the 2 W. 4. c. 34, as to the coining not being complete, not applying to the copper coin.

Proof of counterfeiting foreign coin.] There is no statutory provision against the counterfeiting of foreign coin current in this country by proclamation, the statute 4 Hen. 7. c. 18, being repealed by the 2 W. 4. c. 34. The counterfeiting of foreign coin not so current, is provided for by the stat. 37 G. 3. c. 126. s. 2, which reciting, that the practice of counterfeiting foreign gold and silver coin, and the bringing into this realm, and uttering within the same, false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called *louis d'ors*, and pieces of silver coin commonly called *dollars*, has of late greatly increased; and it is expedient that provision be made

more effectually to prevent the same, enacts, that if any person or persons shall, from and after the passing of this act, make, coin, or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, such person or persons offending therein shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years.

Upon an indictment under this statute, it must be proved that the coin was counterfeit, in the same manner as in cases of counterfeiting the coin of the realm, *ante*, *p.* 298, except that there is no provision in the 37 G. 3, as to the coin not being perfected. Evidence must be given, that the coin counterfeited is that of the foreign country mentioned in the indictment. By the words in the statute, "not permitted to be current within the realm," must be understood, not permitted to be current by proclamation under the great seal. 1 *East, P. C.* 161.

By section 7 of the above statute, a power is given to a justice of the peace, to grant a warrant upon oath, to search the dwelling-house, &c. of persons suspected of counterfeiting foreign coin.

Proof of importing foreign counterfeit coin.] By the third section of the 37 G. 3. c. 126, it is enacted, that if any person or persons shall, from and after the passing of this act, bring into this realm any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same, all and every such person or persons shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years, not exceeding seven years.

The collecting the counterfeit monies of foreign countries from the venders of it in this country, is not a *bringing* of it into the realm, within the above section. 1 *East, P. C.* 177.

To support the indictment there must be proved, the fact of the coin being counterfeit, the bringing it into the realm, the guilty knowledge of the prisoner, and his intent to utter it within the realm or the dominions of the same.

Proof of uttering foreign counterfeit coin.] By the 4th section of the 37 G. 3. c. 126, it is enacted, that if any person or persons shall, from and after the passing of this act, utter or tender in payment, or give in exchange, or pay or put

off to any person or persons, any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every person so offending shall suffer six months' imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time for the like offence of uttering, or tendering in payment, or giving in exchange, or paying or putting off, any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, such person shall, for such second offence, suffer two years' imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the said first two years; and if the same person shall afterwards offend a third time, in uttering or tendering in payment, or giving in exchange, or paying or putting off, any such false or counterfeit coin aforesaid, knowing the same to be false or counterfeit, and shall be convicted of such third offence, he or she shall be adjudged to be guilty of felony, without benefit of clergy.

The evidence on an indictment under the above statute, will be substantially the same as for a similar offence against the king's current gold or silver coin. Where a person is indicted for a second uttering, after a previous conviction, a certificate of such former conviction from the clerk of assize or clerk of the peace, is made evidence by 5th section of the 37 Geo. 3. c. 126.

Proof of having possession of five or more pieces of foreign counterfeit coin.] By the sixth section of the 37 Geo. 3. c. 126, it is enacted, that if any person or persons shall have in his, her, or their custody, without lawful excuse, any greater number of pieces than five pieces of false or counterfeit coin, of any kind or kinds, resembling, or made with intent to resemble or look like any gold or silver coin or coins of any foreign prince, state, or country, or to pass as such foreign coin, every such person, being thereof convicted, upon the oath of one or more credible witness or witnesses, before one of his majesty's justices of the peace, shall forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall, for every such offence, forfeit and pay any sum of money not exceeding five pounds, nor less than forty shillings, for every such piece of false or counterfeit coin which shall be found in the custody of such person; one moiety to the informer or informers, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall

not be forthwith paid, it shall be lawful for such justice to commit the person who shall be adjudged to pay the same to the common gaol, or house of correction, there to be kept to hard labour, for the space of three calendar months, or until such penalty shall be paid.

Proof of offences with regard to coining-tools.] By 2 W. 4. c. 34. s. 10, it is enacted, that if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession any edger, edging-tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used or to be intended to be used for, or in order to the counterfeiting of any of the king's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable at the discretion of the Court to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years.

The prosecutor must prove, first, the commission of the act as stated in the indictment, *viz.* the making or mending, or beginning to make or mend, or the buying or selling, or the knowingly and without excuse having in custody or possession, the particular coining-tool specified.

The particular tool specified must then be proved. With regard to all the tools mentioned in the new statute, it should be observed that they are described to be such as will impress "any *part* or *parts* of both or either of the sides" of any of the king's current gold or silver coin, a description of tool not included in the former acts. The new statute, like the former, divides the coining instruments into those upon which there shall be "made or impressed," and those "which will make or impress" the figure, &c. of both or either of the sides of the lawful coin. The following case therefore is still applicable. The prisoner was indicted for having in his custody a mould, upon which there was made and impressed, &c. the figure of a shilling. The mould bore the resemblance of a shilling inverted, viz. the *convex* parts being *concave* in the mould; and it was objected that it should have been described as an instrument which *would make* or *impress*, &c., and not as one on which *was made and impressed*, &c.; but a great majority of the judges were of opinion that the evidence maintained the indictment, because the stamp of the current coin was impressed upon the mould. They agreed, however, that it would have been more accurate had the instrument been described as one "which would make or impress." *Lennard's case*, 1 *Leach*, 92. 1 *East*, P. C. 170.

Upon the repealed statute of 8 & 9 W. 3. c. 26, it was held, that it was not confined to such instruments as, used by the hand, unconnected with any other power, will produce the effect. A collar marking the edge, by having the coin forced through it by machinery, is an instrument within the act; though this mode of marking the edges is of modern invention. *Moore's case*, 1 *Moody*, C. C. 122.

The words "figure, stamp, or apparent resemblance," do not mean an exact resemblance; but if the instrument will impress a resemblance in point of fact, such as will impose upon the world, it is sufficient. *Ridgelay's case*, 1 *East*, P. C. 171. 1 *Leach*, 189.

With regard to the guilty knowledge of the prisoner there is a distinction to be observed, with respect to the different offences mentioned in sec. 10. Where the indictment is for the making or mending, &c. of the coining tools first described, it is not necessary to prove that the prisoner knew the puncheon, &c. to be used, or intended to be used in the making of counterfeit coin; the fact of the instrument bearing the resemblance of the current coin, being necessarily evidence of such knowledge. But it is otherwise upon a charge of making, &c. any edger or edging tool, in which case it must be proved that the prisoner committed the act, knowing that the instrument was adapted and intended for the marking of coin round the edges. The reason is, that the latter instruments are used in certain trades;

and so, with regard to making any *press for coinage*, &c., it must be shown that the prisoner knew it to be a press for coinage.

Venue.] By 2 W. 4. c. 34. s. 15. it is enacted, that where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction.

Traversing.] By 2 W. 4. c. 34. s. 16. it is enacted, that no person against whom any bill of indictment shall be found at any assizes or sessions of the peace, for any misdemeanor against this act, shall be entitled to traverse the same to any subsequent assizes or sessions, but the Court before which the bill of indictment shall be returned as found shall forthwith proceed to try the person against whom the same is found, unless such person or the prosecutor shall show good cause, to be allowed by the Court, for the postponement of the trial: Provided always, that the rights and liabilities of persons indicted under this act in Scotland, so far as relates to the postponement or time of trial, shall remain and be dealt with in the same manner as in the cases of all other persons indicted for crime in that country.

Accessories.] By 2 W. 4. c. 34. s. 18. it is enacted, that, in the case of every felony punishable under this act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

Interpretation clause.] By 2 W. 4. c. 34. s. 21. it is declared and enacted, that, where the King's current gold or silver coin, or the King's current copper coin, shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin or any copper coin respectively coined in any of his Majesty's mints, and lawfully current in any part of his Majesty's dominions, whether within the United Kingdom or otherwise; and that any of the King's current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble, or be apparently intended to resemble or pass for, any of the King's

current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin; and that, where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act.

COMPOUNDING OFFENCES, &c.

Compounding felonies and misdemeanors . . 311
Informations on penal statutes . . . 311
Misprision of felony 312
Taking rewards for helping to stolen goods, &c. . . 312

Compounding felonies and misdemeanors.] Though the bare taking again of a man's own goods which have been stolen, (without favour shown to the thief) is no offence, *Hawk. P. C. b.* 1. *c.* 59. *s.* 7, yet where he either takes back the goods, or receives other amends, on condition of not prosecuting, this is a misdemeanor punishable by fine and imprisonment. *Id. s.* 5. So an agreement to put an end to an indictment for a misdemeanor is unlawful, *Collins v. Blantern*, 2 *Wils.* 341, unless it be with the consent of the Court. 4 *Bl. Com.* 363. *Beeley v. Wingfield*, 11 *East*, 46.

Compounding informations on penal statutes.] Compounding informations on penal statutes is an offence at common law. And by stat. 18 Eliz. c. 5. s. 4. if any informer, by colour or pretence of process, or without process, upon colour or pretence of any manner of offence against any penal law, make any com-

position, or take any money, reward, or promise of reward, without the order or consent of the Court, he shall stand two hours in the pillory, be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This statute does not extend to penalties only recoverable by information before justices. *Crisp's case*, 1 *B. & Ald.* 282. But it is not necessary to bring the case within the statute, that there should be an action or other proceeding pending. *Gotley's case*, *Russ & Ry.* 84. A mere threat to prosecute for the recovery of penalties, not amounting to an indictable offence at common law, is yet, it seems, within the above statute. *Southerton's case*, 6 *East*, 126.

Misprision of felony.] Somewhat analogous to the offence of compounding felony, is that of misprision of felony. Misprision of felony is the concealment, or procuring the concealment of felony, whether such felony be at common law or by statute. *Hawk. P. C. b.* 1. *c.* 59. *s.* 2. Silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision. *Ibid. n.* 1 *Hale, P. C.* 431, 448, 533. If to the knowledge there be added assent, the party will become an accessory. 4 *Bl. Com.* 121. The punishment for this offence is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners, and other officers, are contained in the statute 3 Edw. 1. c. 9.

Taking rewards for helping to stolen goods—advertising rewards, &c.] Similar to the offence of compounding a felony, is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose. These offences are provided against by the statute 7 & 8 G. 4. c. 29. ss. 58, 59.

CONSPIRACY.

Proof of nature of conspiracy in general . . 313
To charge party with offence . . 314
To pervert the course of justice . . 314
Relating to the public funds, &c. . . 315
To create riot, &c. 315
Against morality and decency . . 315
To marry paupers . . . 315

Affecting trade—to defraud the public . . 316
By workmen to raise wages . . . 317
To extort money from individuals . . 319
To defraud individuals . . . 319
To injure individuals in their trade . . 320
To commit a civil trespass . . . 320
Legal associations . . . 321
Proof of the existence of a conspiracy . . 321
Declarations of other conspirators . . 324
Proof of acts, &c., done by other conspirators . 325
Proof of the means used . . . 325
Cumulative instances . . . 326
Proof of the object of the conspiracy . . 326
Cross-examination of witnesses . . . 327
Venue 327

The various cases in which a combination between two or more individuals to do certain acts, will amount in law to a conspiracy, and be punishable as such, will be shortly stated, and the evidence to support an indictment in such cases, will be then considered.

Proof of nature of conspiracy—in general.] With regard to conspiracies in general, it is to be observed, that the nature of the offence requires that more than one person should be concerned in its commission. But where two persons are indicted for a conspiracy, one of them may be convicted, though the other who has pleaded, and is alive, has not been tried, and though it is possible he may afterwards be acquitted. *Cooke's case*, 5 *B. & C.* 538, 7 *D. & R.* 673. A prosecution for a conspiracy cannot be maintained against the husband and wife only, for they are one person in law. *Hawk. P. C. b.* 1. *c.* 72. *s.* 8. An agreement by several to do a certain thing may be the subject of an indictment for conspiracy, though the same thing done separately by the several individuals, without any agreement between themselves, would not be illegal, as in the case of journeymen conspiring to raise their wages; for each may insist on his own wages being raised; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy. *Mawbey's case*, 6 *T. R.* 636. *Case of the Journeymen Tailors of Cambridge*, 8 *Mod.* 11. So where several persons conspired to hiss at a theatre, Lord Mansfield held it indictable, though each might have hissed separately. *Anon. cited in Mawbey's case*, 6 *T. R.* 619. If several persons concur in the act, it appears that they will be all guilty of a conspiracy, notwithstanding they were not previously acquainted with each

other. *Per Lord Mansfield, Case of prisoners in K. B. Hawk. P. C. b.* 1. *c.* 72. *s.* 2. (*n.*)

The offence of conspiracy consists in the unlawful agreement, although nothing be done in pursuance of it, for it is the conspiring which is the *gist* of the offence. *Best's case,* 2 *Ld. Raym.* 1167. *Spragg's case,* 2 *Burr.* 993. *Rispal's case,* 3 *Burr.* 1321, 2 *Russell,* 553. *Gill's case,* 2 *B. & Ald.* 204.

Conspiring to do a lawful act, if for an unlawful end, is indictable. *Edwards's case,* 8 *Mod.* 320, 2 *Russell,* 553. (*n.*) And so with regard to a conspiracy to effect a legal purpose by unlawful means, and although the purpose be not effected. *Journeymen Tailors of Cambridge,* 8 *Mod.* 11. *Best's case,* 2 *Ld. Raym.* 1167, 6 *Mod.* 85, 2 *Russell,* 553. *Eccles' case, Hawk. P. C. b.* 1. *c.* 72. *s.* 3. (*n.*)

Proof of nature of conspiracy—to charge party with offence.] A conspiracy to charge an innocent person with an offence, whether temporal or spiritual, is an indictable offence. *Best's case,* 2 *Lord Raym.* 1167, 1 *Salk.* 174, 2 *Russell,* 555. And it is no justification of such a conspiracy that the indictment was defective, or that the Court had no jurisdiction, or that the parties only intended to give their testimony in a due course of law, for the criminal intention was the same. *Hawk. P. C. b.* 1. *c.* 72. *s.* 3, 4. Where the charge was for conspiring *falsely* to indict a person, for the purpose of extorting money, and the jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, (without saying *falsely,*) it was held sufficient, it being a misdemeanor, whether the charge was true or not. *Hollingberry's case,* 4 *B. & C.* 329. Although several persons may not combine together to prosecute an innocent person, yet they may meet together and consult to prosecute a guilty person, or one against whom there is probable ground of suspicion. *Hawk. P. C. b.* 1. *c.* 72. *s.* 7. 2 *Russell,* 556. And no one is liable to any prosecution in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury. *Hawk. P. C. b.* 1. *c.* 72. *s.* 5.

Proof of nature of conspiracy—to pervert the course of justice.] Any combination to obstruct, pervert, or defeat the course of public justice, is punishable as a conspiracy. Thus, a conspiracy to dissuade witnesses from giving evidence, is punishable; *Hawk. P. C. b.* 1. *c.* 21. *s.* 15. *See Bushell v. Barret, Ry. & M. N. P. C.* 434; or to tamper with jurors. 1 *Saund.* 300. *Joliffe's case,* 4 *T. R.* 285. So a conspiracy to pervert the course of justice by producing a false certificate of a high road being in repair, is punishable. *Mawbey's case,* 6 *T. R.* 619. A conspiracy to prevent a prosecution for felony, is as much an offence as a conspiracy to institute a false prosecution. *Per Ld. Eldon, Claridge v. Hoare,* 14 *Ves.* 65.

Proof of nature of conspiracy—conspiracies relating to the public funds, &c.] The conspiring by false rumours to raise the price of the public funds on a particular day, with intent to injure purchasers, has been held to be an indictable offence, and also that the indictment is good, without specifying the particular persons who purchased, or the persons intended to be injured. It was also held, that the public government funds of this kingdom might mean either British or Irish funds. *De Berenger's case*, 3 *M. & S.* 67. Bayley J., said, that to constitute this an offence, it was not necessary that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects; but that it was sufficient if it were prejudicial to a class of the subjects. *Id.* 75. *See Crowther v. Hopwood*, 3 *Stark. N. P. C.* 21. 2 *Dod. Ad. Rep.* 174. So a conspiracy to impoverish the farmers of the excise was held indictable; for it tended to prejudice the revenue of the crown. *Starling's case*, 1 *Sid.* 174. 2 *Russell*, 559. So a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, was ruled by Lord Ellenborough to be a misdemeanor. *Pollman's case*, 2 *Campb.* 229.

Proof of nature of conspiracy—to create a riot—cause mutiny, &c.] A conspiracy to commit a riot is indictable. 2 *Russell*, 560, 2 *Chitty, C. L.* 506. (*n.*) So if a body of persons go to a theatre with the settled intention of hissing an actor or damning a piece, such a deliberate and preconcerted scheme would amount to a conspiracy. *Per Lord Ellenborough, Clifford v. Brandon*, 2 *Campb.* 369. 6 *T. R.* 628. A combination amongst officers of the East India Company to resign their commissions, with a view to force the company to make them an additional allowance, is indictable, as tending to excite insurrection, and a resignation made under such circumstances is not a determination of the service. *Vertue v. Lord Clive*, 4 *Burr.* 2472.

Proof of nature of conspiracy—against morality and public decency.] A combination to do any act contrary to morality or public decency is a punishable misdemeanor, as a conspiracy to seduce a young woman. *Lord Grey's case*, 3 *St. Tr.* 519, 1 *East, P. C.* 460. So a conspiracy to take away a young woman, an heiress, from the custody of her friends, for the purpose of marrying her to one of the conspirators. *Wakefield's case*, (*Murray's ed.*) 2 *Deac. Ab. C. L.* 4. A conspiracy to prevent the burial of a corpse, though for the purposes of dissection, has been held to be an indictable offence. *Young's case, cited* 2 *T. R.* 734, 2 *Chit. C. L.* 36. *Vide post, title "Dead Bodies."*

Proof of nature of conspiracy—to marry paupers.] The conspiracy by sinister means to marry a pauper of one parish to a

settled inhabitant of another, is an indictable offence. *Tarrant's case*, 4 *Burr.* 2106. *Herbert's case*, 1 *East*, *P. C.* 461. *Compton's case*, *Cald.* 246. Where the marriage is by consent of the parties, although money has been given to one of them by the overseers to procure it, it is not an indictable offence. In such a case, Buller J. directed an acquittal, holding it necessary, in support of such an indictment, to show that the defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; that the act of marriage, being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means; and this he said had been several times ruled by different judges; *Fowler's case*, 1 *East*, *P. C.* 461; and the same has been determined in a very late case. *Seward's case*, 1 *Ad. & Ell.* 462, 3 *Nev. & M.* 557. Where it is stated to have been by threats and menaces, it is not necessary to aver that the marriage was had against the consent of the parties, though that fact must be proved. *Parkhouse's case*, 1 *East*, *P. C.* 462.

A conspiracy to exonerate a parish from the prospective burthen of maintaining a pauper not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not an indictable offence. *Seward's case*, 3 *Nev. & M.* 557, 1 *Ad. & Ell.* 462.

Proof of nature of conspiracy—affecting trade—to defraud the public, &c.] A conspiracy to impoverish A. B., a tailor, and to prevent him by indirect means from carrying on his trade, has been held to be indictable. *Eccles's case*, 1 *Leach*, 274, 3 *Dougl.* 337. This offence was considered by Lord Ellenborough to be a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. *Turner's case*, 13 *East*, 228. Though persons, in possession of articles of trade, may sell them at such prices as they individually may please, yet if they confederate, and agree not to sell them under certain prices, it is a conspiracy. *Per Lord Mansfield*, *Eccles's case*, 1 *Leach*, 276. Where, in an action for libel, it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale there should be a meeting, consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference, between the price at which the goods were bought at the auction and the fair price at this private resale, should be shared amongst them, Gurney B. said, "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction, upon an agreement amongst themselves of the kind that has

been described, they are guilty of an indictable offence, and may be tried for a conspiracy." *Levi v. Levi*, 6 *C. & P.* 240.

A conspiracy to raise money by means of a bill importing to be a country bank bill, where there is no such bank, and none of the parties are of ability to pay the bill, is indictable. *Anon. Pasch.* 1782, *Bayley's MSS.* *Vide post*, 319.

Proof of nature of conspiracies—of workmen to raise wages, &c.] Though every man may work at what price he pleases, yet a combination not to work under certain prices is an indictable offence. *Per Lord Mansfield, Eccles's case*, 1 *Leach*, 276. So a combination by workmen, to prevent the workmen employed by certain persons from continuing to work in their employ, and to compel the masters to discharge those workmen, is a conspiracy, and punishable as such. *Bykersdike's case*, 1 *Moody & Rob.* 179. So a conspiracy by workmen to prevent their masters from taking *any* apprentices; and it is no variance upon such an indictment, if it appears that the conspiracy was to prevent the masters from taking more than a certain number they then had. *Ferguson's case*, 2 *Stark. N. P. C.* 489. If the masters of workmen combine together to lower the rate of wages, they also are liable to be punished for a conspiracy. *See Hammond's case*, 2 *Esp. N. P. C.* 720.

Formerly various statutes existed for repressing the practice of combination amongst workmen; but these were repealed by the 5 G. 4. c. 95. and other provisions substituted. The latter statute, however, being found ineffectual for the purposes intended, it was repealed by the 6 G. 4. c. 129. s. 1. which continues the repeal of the former statutes, and enacts the following provisions with regard to the combination of workmen.

The third section enacts, that from and after the passing of this act, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired, or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished; or prevent, or endeavour to prevent, any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats, or intimidation, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his

not having complied, or of his refusing to comply, with any rules, orders, resolutions, or regulations, made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months.

The fourth section enacts, That this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into such agreement as aforesaid, shall not be liable to any prosecution, &c.

The fifth section provides and enacts, That this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours of the time of working in any manufacture, trade, or business; or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution, &c.

The statute also provides, that offenders shall be obliged to give evidence, and shall be indemnified.

Proof of nature of conspiracy—to extort money from individuals.] A conspiracy to extort money from an individual is punishable, as conspiring to charge him with being the father of a bastard child. *Kimberty's case*, 1 *Lev.* 62, *vide ante*, *p.* 293. And it is an indictable offence, even without an intent to extort money, for at all events it is a conspiracy to charge a man with fornication. *Best's case*, 2 *Lord Raym.* 1167. *See also Hollingberry's case*, 4 *B. & C.* 329, *ante*, *p.* 314.

Proof of nature of conspiracy—to defraud individuals.] Frauds practised by swindlers upon individuals, may sometimes be indictable as conspiracies. 2 *Russell*, 561. As where three persons conspired, that one should write his acceptance on a pretended bill of exchange, in order that the second might by means of this acceptance, and of the indorsement of the third, negotiate it as a good bill, and thereby procure goods from the prosecutor. *Hevey's case*, 2 *East*, *P. C.* 858. (*n.*) So an indictment may be maintained for a conspiracy by the defendants, to cause themselves to be believed persons of considerable property, for the purpose of defrauding a tradesman. *Robert's case*, 1 *Camph.* 399. If a man and a woman marry, the man in the name of another, for the purpose of raising a spurious title to the estate of the person whose name is assumed, it is indictable as a conspiracy, and in such case it was held not to be necessary to show an immediate injury, but that it was for the jury to say, whether the parties did not intend a future injury. *Robinson's case*, 1 *Leach*, 37, 2 *East*, *P. C.* 1010. The following case has generally been regarded as that of a conspiracy to defraud an individual. The indictment charged, that the defendants, M. and F., falsely intending to defraud T. C. of divers goods, together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine as good and true new Portugal wine of him the said F. for a certain quantity of hats of him, the said T. C. and upon such bartering, &c. the said F. &c. pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines, and the said M. on such bartering, &c. pretended to be a broker of London, when, in fact, he was not; and that T. C. giving credit to the said fictitious assumption, personating and deceits, did barter, sell, and exchange to F. and did deliver to M. as the broker between T. C. and F. a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine, and that M. and F. on such bartering, &c. affirmed, that it was true new Lisbon wine of Portugal, and was the wine of F. when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to F.; to the great deceit and damage of the said T. C. and against the

peace, &c. The indictment, which was for a cheat at common law, did not charge that the defendants *conspired, eo nomine*, yet charged that they *together*, &c. did the acts imputed to them, which might be considered to be tantamount; but it was regarded as a case of doubt and difficulty. It does not clearly appear from the reports how the case was decided, but on referring to the roll, it was found that judgment had been entered for the crown. The true ground of that judgment is thought by Mr. East, to be given by Mr. Justice Dennison in *Wheatley's case, (M.S. Dunning, vide* 2 *Burr.* 1129, 6 *Mod.* 302,) *viz.* that it was a conspiracy. *Macarty's case*, 2 *Lord Raym.* 1179, 3 *Id.* 487, 2 *East, P. C.* 823, 2 *Russell*, 562.

Proof of nature of conspiracy—to injure an individual in his trade or profession.] A combination to injure any particular individual in his trade or profession, is indictable as a conspiracy, as in *Eccles's case*, 1 *Leach*, 274, already cited, *ante*, *p.* 316, and in *Lee's case*, 2 *M'Nally on Ev.* 634, *post*, *p.* 323.

Proof of nature of conspiracy—to commit a civil trespass, &c.] A conspiracy to commit an act, which amounts merely to a civil trespass, has been held not to be indictable, as where several persons combined to go into a preserve to snare hares, though it was alleged that they went in the night time, and that they were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend them. *Turner's case*, 13 *East*, 228. *See Deacon on the Game Laws*, 175.

In the following case, the acts charged as a conspiracy were ruled to amount merely to a breach of contract. The defendants were indicted for conspiring to defraud Gen. Maclean, by selling him an unsound horse. The defendant Pywell advertised the sale, undertaking to warrant. Budgery, another defendant, stated to Gen. Maclean, that he had lived with the owner of the horse, and knew him to be perfectly sound. Gen. Maclean purchased the horse with a warranty, and soon after found that the animal was nearly worthless. The prosecutor was proceeding to give evidence of the steps taken to return the horse, when Lord Ellenborough intimated, that the case did not assume the shape of a conspiracy; and that the evidence did not warrant any proceeding beyond an action on the warranty for the breach of a civil contract. He said, that if this were to be considered an indictable offence, then instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats; and that no indictment in a case like this could be maintained without evidence of concert between the parties, to effectuate a fraud. *Pywell's case.* 1 *Stark. N. P. C.* 402. It is not to be concluded from this case, that an indictment for a conspiracy may not be sustained against parties

who combine together to defraud another, by selling as a sound horse one that is unsound; but merely that under the circumstances above stated, there was no evidence of a conspiracy.

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company, with transferable shares. Lord Ellenborough said, that as the society was illegal, to deprive an individual of an office in it, could not be considered a crime. *Stratton's case*, 1 *Campb.* 549. (*n.*)

Proof of nature of conspiracy—legal associations.] Associations to prosecute felons, and even to put the laws in force against political offenders, are lawful. *Murray's case, coram Abbott C. J., Matthews, Dig. C. L.* 90.

Proof of the existence of a conspiracy in general.] It is a question of some difficulty, how far it is competent for the prosecutor to show, in the first instance, the existence of a conspiracy, amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of the case to be subsequently proved. The rule laid down by Mr. East is as follows:—"The conspiracy or agreement amongst several, to act in concert for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." 1 *East, P. C.* 96. But it is observed by Mr. Starkie, that in some peculiar instances in which it would be difficult to establish the defendant's privity, without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. 2 *Stark. Ev.* 234, 2*d ed.* So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. "In indictments of this kind," he says, "there are two things to be considered; first, whether any conspiracy exists, and next, what share the prisoner took in the conspiracy." He afterwards proceeds, "Before the evidence (of the conspiracy) can affect the prisoner materially, it is necessary to make out another point, *viz.* that he consented to the extent that the others did." *Hardy's case, Gurney's ed. vol. i. p.* 360, 369, 2 *Stark. Ev.* 234, 2*d ed.* So in the course of the same trial, it was said by

Eyre C. J., that in the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the Court is to be affected for his share of it. *Id.* Upon a prosecution for a conspiracy to raise the rate of wages, proof was given of an association of persons for that purpose, of meetings, of rules being printed, and of mutual subscriptions, &c. It was objected that evidence could not be given of these facts, without first bringing them home to the defendants, and making them parties to the combination; but Lord Kenyon permitted a person who was a member of the society to prove the printed regulations and rules, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of this society, and equally concerned, but added, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. *Hammond's case,* 2 *Esp. N. P. C.* 720. So in many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. 2 *Russell,* 572, *citing Lord Stafford's case,* 7 *St. Tr.* 1218, *Lord W. Russell's case,* 9 *St. Tr.* 578, *Lord Lovat's case,* 18 *St. Tr.* 530, *Hardy's case,* 24 *St. Tr.* 199, *Horne Tooke's case,* 25 *St. Tr.* 1. The point may be considered as settled ultimately in *The Queen's case,* 2 *Brod. & Bingh.* 310, where the following rules were laid down by the judges, "We are of opinion, that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received, as a preliminary step to that more particular evidence, by which it is to be shown, that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and, on that account, we presume it is permitted. But it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening, it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine,* and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be an useless waste of time."

The rule, says Mr. Starkie, that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the Courts, in cases of

conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence, in order to establish the fact of a conspiracy, it is to be remembered that this is an inversion of the usual order, for the sake of convenience, and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved. 2 *Stark. Ev.* 235, 2*d ed.*

Upon an indictment for a conspiracy the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case, circumstantial. 2 *Stark. Ev.* 232, 2*d ed.* *Cope's case*, 1 *Str.* 144. Thus upon a trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock-lane, Lord Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances. *Parsons' case*, 1 *W. Bl.* 392. Upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected for the defendants that, in support of the prosecution, evidence should be given of a *previous* meeting of the parties accused, for the purpose of confederating to carry their object into execution. But Lord Mansfield overruled the objection. He said, that, if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants, against the person intended to be injured. *Lee's case*, 2 *M'Nally on Evid.* 634. A husband, his wife, and their servants were indicted for a conspiracy to ruin a card-maker, and it appeared that each had given money to the apprentices of the prosecutor to put grease into the paste, which spoiled the cards, but no evidence was given of more than one of the defendants being present at the same time; it was objected that this was not a conspiracy, there being no evidence of communication; but Pratt, C. J., ruled that the defendants, being all of one family, and concerned in making cards, this was evidence of a conspiracy to go to a jury. *Cope's case*, 1 *Str.* 144, 2 *Russell*, 571, 2 *Stark. Ev.* 233. 2*d ed.*

The *existence* of the conspiracy may be established either as above stated, by evidence of the acts of third persons, or by evidence of the acts of the prisoner, and of any other with whom he is attempted to be connected, concurring together at the same time and for the same object. And here, says Mr. East, the evidence of a conspiracy is more or less strong, according to the publicity or privacy of the object of such concurrence, and the greater or less degree of similarity in the means employed to effect

it. The more secret the one and the greater coincidence in the other, the stronger is the evidence of conspiracy. 1 *East, P. C.* 97.

Proof of the existence of conspiracy—Declarations of other conspirators.] Supposing that the existence of a conspiracy may in the first instance be proved, without showing the participation or knowledge of the defendants, it is still a question whether the declarations of some of the persons engaged in the conspiracy may be given in evidence against others, in order to prove its existence; and upon principle such evidence appears to be inadmissible. The opinions of the judges upon this question have been at variance. In *Hardy's case*, which was an indictment for high treason, in conspiring the death of the King, it was proposed to read a letter written by *Martin*, in London, and addressed, but not sent, to *Margarot*, in Edinburgh, (both being members of the Corresponding Society,) on political subjects, calculated to inflame the minds of the people in the north; Eyre, C. J. was of opinion that this letter was not admissible in evidence against any but the party confessing; two of the judges agreed that a bare relation of facts by a conspirator to a stranger, was merely an admission which might affect himself, but which could not affect a co-conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency of the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy. Buller, J. was of opinion, that evidence of conversations and declarations by parties to a conspiracy, was in general, and of necessity, evidence to prove the existence of the combination. Grose, J. was of the same opinion; but added, that he considered the writing *as an act* which showed the extent of the plan. *Hardy's case*, 25 *St. Tr.* 1. Mr. Starkie remarks that, upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession, unconnected with any act, would not have been admissible. 2 *Stark. Ev.* 236. 2*d ed.*

In the same case it was proposed to read a letter written by Thelwall, another conspirator, to a private friend. Three of the judges were of opinion that the evidence was inadmissible, since it was nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot for its furtherance; it was a sort of confession by Thelwall, and not like an act done by him, as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion that the evidence was admissible, on the ground that

every thing said, and *a fortiori* every thing done by the conspirators, was evidence to show what the design was.

The law on this subject is thus stated by Mr. Starkie. It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; though consultations for that purpose, and letters written in prosecution of the design, even if not sent, are admissible. The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others, to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers. 2 *Stark. Ev.* 235. And this doctrine has been recognized by Mr. Serjeant Russell. 2 *Russell*, 572.

Proof of acts, &c. done by another conspirator.] The cases in which, after the existence of a conspiracy is established, and the particular defendants have been proved to have been parties to it, the acts or declarations of other conspirators may be given in evidence against them, have already been considered (*vide ante, p.* 60. *to p.* 64.) It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design, a principle wholly unaffected by the consideration of their being jointly indicted. Neither does it appear to be material what the nature of the conspiracy is, provided the offence involve a conspiracy. Thus upon an indictment for murder, if it appear that others, together with the prisoner, conspired to commit the crime, the act of one, done in pursuance of that intention, will be evidence against the rest. 2 *Stark. Ev.* 237. 2*d ed.* *See* 6 *T. R.* 528. 11 *East*, 584.

The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. *Whitehead's case*, 1 *Dow. & Ry. N. P.* 61.

Proof of the means used.] Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed upon or pursued to effect it. 2 *Russell*, 568. *Eccles's case*, 1 *Leach*, 274. But, where the indictment charged the defendants with conspiring "to cheat and defraud

the lawful creditors of W. F.," Lord Tenterden thought it too general, in not stating what was intended to be done, or the persons to be defrauded. *Fowle's case*, 4 *C. & P.* 592. *But see De Berenger's case*, 3 *M. & S.* 67. Where the indictment charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences. Bayley, J. said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for the purpose, the offence of conspiracy was complete. *Gill's case*, 2 *Barn. & Ald.* 204. But when the act only becomes illegal from the means used to effect it, the illegality must be explained by proper statements, and established by proof, as in the cases already referred to of conspiracies to marry paupers. 2 *Russell*, 569. *ante*, *p.* 316.

The defendants A. and B. were indicted for conspiring to extort money from the prosecutor, by charging him with forging a certain check for 178*l.*; the indictment set forth a letter from one of the conspirators to the prosecutor, referring to the check, and conversations were proved, relating to it. Such a document was, in fact, in existence, but it was not produced by the prosecutor on the trial, and such production was held to be unnecessary; for it might have been that the existence of such a check was altogether a fabrication. *Ford's case*, 1 *Nev. & M.* 777.

Proof of the means used—cumulative instances.] Upon an indictment charging the defendants with conspiring to cause themselves to be believed persons of considerable property, for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to the tradesmen employed to furnish it, as persons of large fortune. A witness was then called to prove, that at a different time they had made a similar representation to another tradesman. This evidence was objected to, on the ground that the prosecutor could not prove various acts of this kind, but was bound to select and confine himself to one. Lord Ellenborough, however, said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." *Roberts's case*, 1 *Campb.* 399.

Proof of the object of the conspiracy.] The object of the conspiracy must be proved as laid in the indictment. An indictment against A. B. C. and D. charged that they conspired together to obtain "*viz.*: to the use of them the said *A. B.* and

C. and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Lord Ellenborough said, "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think it is not as to D. He is charged with conspiring to procure the appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. Where a conspiracy is charged, it must be charged truly." *Pollman's case*, 2 *Campb.* 233.

Cross-examination of witnesses.] Where, on an indictment for a conspiracy against A. B. and C., C. only called a witness, and examined him as to a conversation between himself and A., it was objected that the counsel for the prosecution had not a right to cross-examine him as to other conversations between C. and A.; but Abbott J. said that he could not prevent him from going into all the conversations which might affect C., though it might be a matter for future consideration, whether A.'s counsel would, after such evidence, have a right to address the jury upon it. The witness was accordingly examined as to several conversations between A. and C., which principally affected the former. *Kroehl's case*, 2 *Stark. N. P. C.* 343.

Venue.] The *gist* of the offence in conspiracy, being the act of conspiring together, and not the act done in pursuance of such combination, the venue in principle ought to be laid in the county in which the conspiring took place, and not where, in the result, the conspiracy was put into execution. *Best's case*, 1 *Salk.* 174, 2 *Russell*, 569. But it has been said, by the Court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. *Brisac's case*, 4 *East*, 171. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint co-operation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. *Bowes's case, cited in Brisac's case, supra.*

DEAD BODIES;

OFFENCES RELATING TO.

Although larceny cannot be committed of a dead body, no one having a property therein, (*vide post, title* "Larceny,") yet it is an offence against decency to take a dead body with intent to sell or dispose of it for profit; and such offence is punishable with fine and imprisonment as a misdemeanor. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence, that no case was reserved. *Gilles's case*, 1 *Russell*, 415, *Russ. & Ry.* 366. (*n.*) So to take up a dead body even for the purposes of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment, that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores;* that the purpose of taking up the body for dissection did not make it less an indictable offence, and that as it had been the regular practice at the Old Bailey, in modern times, to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments, was a proof of the universal opinion of the profession upon this subject. *Lynn's case*, 2 *T. R.* 733, 1 *Leach*, 497; *see also Cundick's case, Dowl. & Ry. N. P. C.* 13.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 86, be suspended by the ordinary for three months; and if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal courts by indictment or information. *Per Abney J., Andrews v. Cawthorne, Willes*, 537. (*n.*)

To bury the dead body of a person who has died a violent death, before the coroner has sat upon it, is punishable as a misdemeanor, and the coroner ought to be sent for, since he is not bound *ex officio* to take the inquest without being sent for. *Clerk's case*, 1 *Salk.* 377. *Anon.* 7 *Mod.* 10. And if a dead body in a prison or other place, upon which an inquest ought to

be taken, is interred, or is suffered to lie so long that it putrifies before the coroner has viewed it, the gaoler or township shall be amerced. *Hawk. P. C. b. 2. c. 9. s. 23.*

The preventing a dead body from being interred has likewise been considered an indictable offence. Thus the master of a workhouse, a servant, and another person, were indicted for a conspiracy to prevent the burial of a person who died in a workhouse. *Young's case, cited 2 T. R. 734.*

Provision is made for the interment of dead bodies which may happen to be cast on shore, by stat. 48 G. 3. c. 75.

DEER;

OFFENCES RELATING TO.

Stealing deer 329
Power of deer-keepers, &c. to seize guns . . 329
Assaulting deer-keepers or their assistants . . 330

Stealing deer.] The former statutes with regard to the offence of stealing deer, are repealed by the act of 7 & 8 G. 4. c. 27, and the law upon the subject is now contained in the 7 & 8 G. 4. c. 29. By the 26th section of that statute, it is enacted, that if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chace, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chace, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and if any person, who shall have been previously convicted of any offence relating to deer for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences herein-before last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

By section 27 of the same statute, suspected persons found in possession of venison, &c., and not satisfactorily accounting for the same, are rendered liable to a penalty not exceeding 20*l.*

Power of deer-keepers, &c., to seize guns, &c.] By section 29 of the above statute, it is enacted, that if any person shall enter into any forest, chace, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer.

Assaulting deer-keepers or their assistants.] By the same section of the 7 & 8 G. 4. c. 29, it is enacted, that if any such offender (*vide supra*) shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

DWELLING HOUSE;

OFFENCES RELATING TO.

Housebreaking 331
Statute 7 & 8 G. 4. c. 29 . . . 331
Proof of the breaking and entering . . 331
Proof of the premises being a dwelling-house . 331
Proof of the larceny 332
Stealing in a dwelling-house to the amount of 5l. . 332
Statute 7 & 8 G. 4. c. 29 . . . 332
Proof of the stealing of the goods—what goods . 333
Proof of the value of the goods stolen . . 333
Proof of the stealing being in a dwelling-house . 334
Consequences of verdict against one of several, as to part of the offence 335
Indictment for burglary 335
Stealing in a dwelling-house, any person being put in fear 335
Statute 7 & 8 G. 4. c. 29 . . . 335
Proof that some person was put in fear . . 336
Breaking and entering a building within the curtilage . 336

HOUSE-BREAKING.

Statute 7 & 8 *G.* 4. *c.* 29.] The offence of house-breaking or stealing in a dwelling-house, was provided against by several statutes, now repealed by the 7 & 8 G. 4. c. 27. The present law is contained in the 7 & 8 G. 4. c. 29.

By the 12th section of that statute, it is enacted, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever, every such offender shall suffer death as a felon. But by statute 3 & 4 W. 4. c. 44, the punishment of death is repealed, and the offender may be transported for life, or for any term not less than seven years, and previously to such transportation, shall be liable to be imprisoned with or without hard labour in the common gaol or house of correction, or to be confined in the penitentiary, for any term not exceeding four years, or shall be liable to be imprisoned with or without hard labour in the common gaol or house of correction, for any term not exceeding four years, nor less than one year.

The section of the same act, (s. 13.) with regard to what shall be considered part of the dwelling-house in burglary, and which has been already given, *ante*, *p.* 278, applies likewise to this offence.

The offence of house-breaking differs from that of burglary, in requiring that an actual larceny should be committed in the house, a mere intent to commit felony not being sufficient, and also in not requiring that the offence should be committed in the night.

The prosecution to support an indictment for house-breaking must prove, 1, the breaking and entering; 2, that it is a dwelling-house; 3, the larceny.

Proof of the breaking and entering.] It is sufficient to prove such a breaking and entering, as, if done in the night, would have constituted burglary. 1 *Hale*, 522, 526, 548. *Foster*, 108, 2 *East*, *P. C.* 638. 2 *Russell*, 47. Where the sash of a window was partly open, but not so much so, as to admit the body of a person, and the prisoner raised it so as to admit a person, upon an indictment for house-breaking, this was held not to amount to a *breaking*. *Henry Smith's case*, 1 *Moody*, *C. C.* 178, *ante*, *p.* 255. *See also Robinson's case*, *Id.* 327, *ante*, *p.* 256. Where the entry was effected through a hole, which had been left in the roof, for the purpose of light, Bosanquet J. held, that it was not sufficient to constitute a breaking of the house. *Sprigg's case*, 1 *Moody & Rob. N. P. C.* 357.

Proof of the premises being a dwelling-house.] Whatever building is, in contemplation of law, a dwelling-house, in which

burglary may be committed, is a dwelling-house also, so far as respects the offence of house-breaking. 2 *Russell*, 48. A chamber in an inn of court, was held to be a dwelling-house within the repealed statute 39 Eliz. c. 15. *Evans's case, Cro. Car.* 473.

With regard to out-buildings, the repealed statute above-mentioned contained the words "dwelling-house or houses, or any part thereof, or any out-house or out-houses belonging and used to and with any dwelling-house." The auxiliary statute 3 & 4 W. & M. c. 9, varies the words, using "dwelling-house, shop, or warehouse thereunto belonging, or therewith used." Both these statutes are now repealed, and the new act only uses the term "dwelling-house." Such buildings, therefore, as, at common law, were considered part of the dwelling-house, (as to which, *vide ante, p.* 277,) come within the protection of the statute, and buildings situated within the curtilage, must appear to be within the provisions of 7 & 8. G. 4. c. 29. s. 13. *ante, p.* 278.

Proof of the larceny.] The larceny must be proved, as in other cases, with this addition, that it must be shown to have taken place in the house. The least removal of the goods from the place where the offender found them, though they be not carried off out of the house, is within the act, as in other larcenies, for the statute does not create a new felony, but only alters the punishment of a particular species of larceny. *Simpson's case,* 1 *Hale, P. C.* 527, *Kel.* 31, 2 *East, P. C.* 639. *See Amier's case,* 6 *C. & P.* 344.

STEALING IN A DWELLING-HOUSE TO THE AMOUNT OF FIVE POUNDS.

Statute 7 *&* 8 *G.* 4. *c.* 29.] This offence, so far as it extended to the sum of 40*s.*, was provided against by the statute 12 Anne, c. 7. (now repealed). The sum being extended to 5*l.*, the offence was made a capital felony by 7 & 8 G. 4. c. 29.

By the 12th section of that statute, it is enacted, that if any person shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.*, or more, every such offender being convicted thereof, shall suffer death as a felon. By the 2 & 3 W. 4. c. 62. the capital punishment is repealed, and transportation for life substituted; and by the 3 & 4 W. 4. c. 44. s. 3. the offender may be kept to hard labour, or imprisoned in the Penitentiary before transportation. *Vide ante, p.* 331.

To support an indictment for this offence, the prosecutor

must prove—1, the stealing; 2, that the goods, &c., stolen, were of the value of 5*l.* or more; and 3, that they were stolen in a dwelling-house.

Proof of the stealing of the goods—what goods.] It is not all goods of the value of 5*l.* or more, which may happen to be within the house, the stealing of which will come within the statute. A distinction is taken between goods which are, as it has been termed, *under the protection of the house*, and those which are not. Therefore, where goods are feloniously obtained from *the person*, they are not considered to be goods within the protection of the house, as where the occupier of the house gave a bank note to the prisoner to get changed, who thereupon stole it, the judges upon a case reserved were of opinion, that this was not a capital offence within the 12 Anne, c. 7. *Campbell's case*, 2 *Leach*, 564, 2 *East*, *P. C.* 644. So where the prisoner obtained a sum of money from the prosecutor, in the dwelling-house of the latter, by *ring-dropping*, this also was held not to be within the statute. The judges were of opinion, that to bring a case within the statute, the property must be under the protection of the house, deposited there for safe custody, as the furniture, money, plate, &c. kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house. *Owen's case*, 2 *East*, *P. C.* 645, 2 *Leach*, 572. The same point was ruled in subsequent cases. *Castledine's case*, *Watson's case*, *Id.* 674. But where goods were left by mistake at a house at which the prisoner lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. *Carroll's case*, 1 *Moody*, *C. C.* 89.

Proof of the value of the goods stolen.] It must appear not only that the goods stolen were of the value of 5*l.*, but likewise that goods to that value were stolen upon one occasion, for a number of distinct larcenies cannot be added together to constitute a compound statutable larceny. Where it appeared that the prisoner had purloined his master's property to a very considerable amount, but it was not shown that he had ever taken to the amount of 40*s.* at any one particular time, upon an indictment under the 12 Anne, c. 7, the Court held that the property stolen must not only be in the whole of such a value as the law requires to constitute a capital offence, but that it must be stolen to that amount at one and the same time; that a number of distinct petty larcenies could not be combined so as to constitute grand larceny, nor could any distinct number of grand larcenies be added together, so as to constitute a capital offence. *Petrie's case*, 1 *Leach*, 295. And the same was ruled by Ashurst J. in a subsequent case. *Farley's case*, 2 *East*, *P. C.* 740. But it may vary the consideration, if the property

of several persons lying together in one bundle or chest, or even in one house, be stolen together at one time; for there the value of all may be put together, so as to make it grand larceny, or to bring it within a statute which aggravates the punishment, for it is one entire felony. 2 *East, P. C.* 740. And where the property was stolen at one time to the value of 40*s.*, and a part of it only, not amounting to 40*s.* was found upon the prisoner, the Court left it to the jury to say, whether the prisoner had not stolen the remainder of the property, which the jury accordingly found. *Hamilton's case*, 1 *Leach*, 348, 2 *Russell*, 53.

Proof of the stealing being in a dwelling-house.] The same evidence which is adduced in indictments for burglary, or housebreaking, or stealing in a dwelling-house, some person therein being put in fear, *vide supra*, will be sufficient proof of the premises being a dwelling-house upon this indictment, and the 13th section of the 7 & 8 Geo. 4. c. 29. extends to this as well as to the above mentioned offences. *Vide ante, p.* 278. *See Turner's case*, 6 *C. & P.* 407.

Several cases have been decided upon the repealed statute, 12 Anne, c. 7. (the words of which are in substance the same as those used in the 7 & 8 Geo. 4. c. 29,) with regard to the *occupation* of the house in which the offence has been committed. Thus it has been held that the words do not include a stealing in a man's own house, on the ground that the statute was not intended to protect property, which might happen to be in a dwelling-house from the owner of the house, but from the depredation of others. *Thompson's case*, 1 *Leach*, 338, 2 *East, P. C.* 644. So where a wife was indicted for this offence, and it appeared that the house was the house of her husband, the judges were unanimously of opinion, that the prisoner could not be convicted of the capital part of the charge, inasmuch as the dwelling-house of her husband must be construed to be her dwelling-house, and the statute evidently means the house of another. *Gould's case*, 1 *Leach*, 339, (*n.*) 2 *East, P. C.* 644.

But the house in which a person lodges merely is not his dwelling-house, so as to prevent the commission of this offence in it by him. Therefore, where a lodger invited a man to his room, and then stole his goods to the value of 40*s.*, when not about his person, he was held to be liable under the 12 Anne, c. 7, to the punishment of stealing in a dwelling-house. *John Taylor's case, Russ. & Ry.* 418.

As in burglary, the ownership of the dwelling-house must be correctly described, and a variance will be fatal. Where a prisoner was indicted for burglary in the dwelling-house of John Snoxall, and stealing goods therein, and it appeared that it was not the dwelling-house of John Snoxall, it was held by Buller J. and Grose J. at the Old Bailey, that he could not be found

guilty, either of the burglary or of stealing to the amount of 40*s.* in the dwelling-house, for it was essential in both cases to state in the indictment *the name* of the person in whose house the offence was committed. *White's case*, 1 *Leach*, 251. So where the house was laid to be the house of Sarah *Lunns*, and it appeared in evidence that her name was Sarah *London*, the variance was held fatal. *Woodward's case*, 1 *Leach*, 253, (*n.*)

Consequences of verdict against one of several, as to part of the offence.] Although a verdict may be found against one only, upon a joint indictment, yet if all the prisoners are found guilty, they must be found guilty of the compound larceny. Thus where A. and B. were indicted under the statute 12 Anne, c. 7, for stealing goods to the value of 6*l.* 10*s.* in a dwelling-house, and the jury found A. guilty of such stealing to the value of 6*l.*, and B. to the value of 10*s.*; upon a case reserved, the judges were of opinion, that judgment could not be given against both the prisoners, but that on a pardon being granted, or a *nolle prosequi* entered as to B., judgment might be given against A. *Hempstead's case*, *Russ. & Ry.* 344.

Indictment for burglary.] Upon an indictment for burglary on a failure to prove a breaking and entering in the night time, the prisoner may be convicted of stealing in a dwelling-house to the value of 5*l.*, *ante*, *p.* 281.

STEALING IN A DWELLING-HOUSE, ANY PERSON THEREIN BEING PUT IN FEAR.

Statute 7 & 8 *Geo.* 4. *c.* 29.] This offence was provided against by the statute 3 W. & M. c. 9. s. 1. (repealed by 7 & 8 Geo. 4. c. 27.) and the provisions of the former statute are re-enacted in the 7 & 8 Geo. 4. c. 29.

By the 12th section of that statute it is enacted, that if any person shall break or enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever, or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear, every such offender being convicted thereof, shall suffer death as a felon.

The 13th section, *vide ante*, *p.* 278, describing the buildings which are to be considered parcel of the dwelling-house, is applicable to this offence.

Upon an indictment for this offence, the prosecutor must prove—1st, the stealing; 2d, that it took place in a dwelling-house; and 3d, that some person therein was put in fear. It will only be necessary in this place to state the evidence with regard to the latter head.

Proof that some person was put in fear.] Some doubt existed with regard to the interpretation of the words "being put in fear," under the repealed statutes, (and the words of the new act are similar,) but the correct opinion appears to be, that though it is necessary that some person in the house should be put in fear by the offenders, yet it is not essential that the larceny should be committed in the presence of that person. 2 *East, P. C.* 633. 2 *Russell*, 49. Whether or not it be necessary to prove the actual sensation of fear felt by any person in the house, or whether if any person in the house be conscious of the fact at the time of the robbery, the fact itself raises the implication of fear from the reasonable grounds existing for it, does not, says Mr. East, appear to be any where settled. He adds, that the practice is to require proof of the actual fear excited by the fact, when committed out of the presence of the party, so as not to amount to a robbery at common law. But certainly if the person in whose presence the thing was taken, was not conscious of the fact at the time, the case would not fall within the act. 2 *East, P. C.* 634, 635.

Upon an indictment for stealing in a dwelling-house, some person therein being put in fear, the prisoner may be convicted of the simple larceny. *Etherington's case*, 2 *Leach*, 673.

BREAKING AND ENTERING A BUILDING WITHIN THE CURTILAGE.

A distinction having been created by the 13th section of the 7 & 8 Geo. 4. c. 29, (*ante, p.* 278,) between such buildings within the curtilage, as have a communication between themselves and the dwelling-house, either immediate or by means of a covered and inclosed passage, and such buildings as have not; the latter species of buildings are protected by a separate enactment.

By 7 & 8 Geo. 4. c. 29. s. 14, it is enacted, that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, (*s.* 13, *vide ante, p.* 278,) every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, house-breaking, or stealing to the value of 5*l.* in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not

exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment.

Upon this enactment it has been observed, that, specifying as it does, in express terms, a building within the curtilage of a dwelling-house, it appears not to apply to many of those buildings and out-houses, which although not within any common inclosure or curtilage, were deemed by the old law of burglary parcel of the dwelling-house, from their adjoining such dwelling-house, and being in the same occupation. 2 *Russell*, 55. To this it may be added, that the enactment likewise does not seem to extend to those buildings, which being within the curtilage, yet not communicating with the dwelling-house internally, are still held to be parcel of the dwelling-house, as in several of the cases already mentioned. *Vide ante, p.* 263.

Upon an indictment framed upon this enactment, the prosecutor must prove—1st, a breaking and entering, as in burglary.; 2d, a stealing within the building; 3d, that the building comes within the statute, *viz.* that it is a building, within the curtilage of a dwelling-house, occupied therewith, and not being part of such dwelling-house, according to the 13th section of the same statute (*ante, p.* 278,) and, as above suggested, it should also appear that the building is not part of the dwelling-house, according to the rules of the common law.

EMBEZZLEMENT.

Statute 7 & 8 *G.* 4. *c.* 29. 338
Proof of being a servant 339
What servants are within the statute . . 339
Wages or payment of servant . . 341
Proof of being a clerk within the statute . . 341
Proof of being a person employed for the purpose or in the capacity of a clerk or servant within the statute 342
Proof of the chattels, money, &c. embezzled . . 344
Proof of the embezzlement 346
Particulars of the embezzlement . . . 348
Embezzlement by persons employed in the public service 348
Embezzlement by persons employed by the Bank of England 350
Embezzlement by bankers, agents, and factors 351
Embezzlement by other persons . . 354

Statute 7 & 8 *Geo.* 4. *c.* 29.] The offence of embezzlement by clerks and servants was provided for by the statute 39 Geo. 3. c. 85; but that statute is now repealed, and the substance of it re-enacted by 7 & 8 Geo. 4. c. 29.

By the 47th section of the latter statute it is enacted, for the punishment of embezzlements committed by clerks and servants, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for, or in the name, or on the account of, his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed, and every such offender being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as thereinbefore last mentioned. (Sec. 46. *vide post.*)

And (by sec. 48.) for preventing the difficulties that have been experienced, in the prosecution of the last-mentioned offenders, it is enacted, that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him, against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Upon a prosecution under this statute, the prosecutor must prove, 1st, that the prisoner was a clerk or servant, or a person employed for the purpose or in the capacity of a clerk or servant, and that by virtue of such employment he received the money, &c.; 2d, that he received or took into his possession some chattel, money, or valuable security for or on account of his master; and 3d, that he fraudulently embezzled the same, or some part thereof.

Proof of being a servant—What servants are within the act.] It is not every person who is employed as a servant, that comes within the provisions of the statute as to embezzlement; it must be in the course of the servant's employment to receive money, in order to render him liable. Thus the servant of a carrier employed to look after the goods, but not intrusted with the receipt of money, is not within the statute. *Thorley's case*, 1 *Moody, C. C.* 343. The prisoner was an apprentice to a butcher, and his duty was to carry out the meat, but he had never been employed to receive money. Having delivered a bill for meat to one of his master's customers, he embezzled the amount. Being convicted of the embezzlement, the judges, on a case reserved, held the conviction wrong, on the ground that it did not appear by the evidence that the prisoner was employed to receive money for his master, or received the money in question by virtue of his employment. It seemed to be the opinion of the judges that an apprentice was a servant, within the meaning of the act. *Mellish's case, Russ. & Ry.* 80. But it is sufficient if he was employed only upon the one occasion in question to receive money, if acting at that time in the capacity of a servant so employed. Thus a person employed by a carrier was directed by his employer to receive a sum of 2*l.*, which he did receive and embezzled; and on a case reserved, the judges were of opinion that he was rightly convicted of embezzlement. *Spencer's case, Russ. & Ry.* 299. So where a drover, keeping cattle for a farmer at Smithfield, was ordered to drive the cattle to a purchaser and receive the money, which he did, and embezzled it, the judges were unanimously of opinion that the prisoner was a servant within the meaning of the act, and that the conviction was right. *Hughes's case*, 1 *Moody, C. C.* 370.

It is not necessary that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. The prisoner was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which the prisoner did, and embezzled them. Being indicted (under stat. 39 G. 3. c. 85.) for this embezzlement, a doubt arose whether it was by virtue of his employment, and the case was reserved for the opinion of the judges. Abbott, C. J., Holroyd, J., and Garrow, B., thought that the prisoner did not receive the money by virtue of his employment, because it was out of the course of his employment to receive it. But Park, J., Burrough, J., Best, J., Hullock, B., and Bayley, J., thought otherwise; because, although out of the ordinary course of the prisoner's employment, yet as, in the character of servant, he had submitted to be employed to receive the money, the case was within the statute. *Thomas Smith's case, Russ. & Ry.* 516.

So although it may not have been part of the servant's duty to receive money, in the capacity in which he was originally hired, yet, if he has been in the habit of receiving money for his master, he is within the statute. Thus where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them; Richards, C. B., held him to be a servant within the 39 G. 3. c. 85, saying that he had no doubt the statute was intended to comprehend masters and servants of all kinds, whether originally connected in any particular character and capacity or not. *Barker's case, Dow. & Ry. N. P. C.* 19.

If the servant be intrusted with the receipt of money from particular persons, in the ordinary course of his employment, and receives money from other persons and embezzles it, the case seems to be within the act. The prisoner was employed by the prosecutors in the capacity of clerk, as *evening collector*, in which character it was his duty to receive every evening, from the porters employed in the business, such money as they had received from the customers in the course of the day; and it was the prisoner's duty to pay over these sums to another clerk the following morning. He was not expected in the course of his employment to receive money from the customers themselves. Having called on a customer for payment of a bill, he received a check and embezzled it. Being convicted of this offence, the judges, on a case reserved, were of opinion, that as the prisoner was intrusted to receive from the porters such monies as they had collected from the customers in the course of the day, the receiving immediately from the customers, instead of receiving through the medium of the porters, was such a receipt of money "by virtue of his employment" as the act meant to protect. *Beechey's case, Russ. & Ry.* 319. So where the prisoner received a sum of money from one of his master's regular customers, and it appeared that it was not part of his duty to receive monies from those persons, it was ruled by Arabin, S., after consulting Gaselee, J., Alderson, B., and Gurney, B., that this was within the statute. *Williams's case*, 6 *C. & P.* 626.

A female servant is within the statute. *Elizabeth Smith's case, Russ. & Ry.* 267. So likewise is an apprentice. *Mellish's case, Russ. & Ry.* 80, *ante*, p. 339. So a clerk or servant to a corporation, although not appointed under the common seal, for he is, notwithstanding, a person employed as a clerk or servant within the statute. *Welling's case*, 1 *C. & P.* 457. And in *Williams v. Stott*, 1 *Crom. & M.* 689, it is said by Vaughan B. that there can be no doubt that the statute would be held to embrace persons employed in the capacity of clerks or servants to corporations.

A person who is the servant of two persons in partnership is the servant of each within the act. The prisoner was in the employ of Bridson and Ridgway as their book-keeper. While in this situation, he received into his possession the notes in question, being the private property of Bridson, to be deposited in the safe where the money of the firm was usually kept. Being indicted for embezzling these notes, it was objected that he was the servant of the partners, and not of the individuals; but Bayley J. held that he was the servant of both [each,] and said that it had been decided by the judges, that where a traveller is employed by several houses to receive money, he is the individual servant of each. (*Carr's case, Russ. & Ry.* 198, *post*, *p.* 342.) *Leech's case*, 3 *Stark.* 70.

Proof of being a servant within the statute—wages or payment of servant.] Several cases have occurred in which doubts have arisen whether the party offending could be considered a *servant* within the meaning of the statute, on account of the manner in which he was remunerated for his services. The allowance of part of the profit on the goods sold will not prevent the character of servant from arising. The prisoner was employed to take coals from a colliery and sell them, and bring the money to his employer. The mode of paying him was by allowing him two-third parts of the price for which he sold the coal, above the price charged at the colliery. It was objected that the money was the joint property of himself and his employer; and the point was reserved for the judges, who held that the prisoner was a servant within the act. They said that the mode of paying him for his labour did not vary the nature of his employment, nor make him less a servant than if he had been paid a certain price per chaldron or per day; and as to the price at which the coals were charged at the colliery in this instance, that sum he received solely on his master's account as his servant, and by embezzling it became guilty of larceny within the statute. *Hartley's case, Russ. & Ry.* 139. The prisoner was employed by the prosecutors, who were turners, and was paid according to what he did. It was part of his duty to receive orders for jobs, and to take the necessary materials from his master's stock to work them up, to deliver out the articles, and to receive the money for them; and then his business was to deliver the whole of the money to his masters, and to receive back, at the week's end, a proportion of it for working up the articles. Having executed an order, the prisoner received three shillings for which he did not account. Being convicted of embezzling the three shillings, a doubt arose whether this was not a fraudulent concealment of the order, and an embezzlement of the materials; but the judges held the conviction right. *Hoggins's case, Russ. & Ry.* 145.

Proof of being a clerk, within the statute.] A person who acts as a traveller for various mercantile houses, takes orders,

and receives monies for them, and is paid by a commission, is *a clerk* within the statute. The prisoner was indicted for embezzling the property of his employers, Stanley and Co. He was employed by them and other houses as a traveller, to take orders for goods and collect money for them from their customers. He did not live in the house with them. He was paid by a commission of 5 per cent. on all goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way than as above stated. Stanley and Co. did not allow him any thing for the expenses of his journeys. Having been convicted of embezzling money, the property of Stanley and Co., the judges, on a case reserved, held the conviction right. *Carr's case, Russ. & Ry.* 198.

A person employed by overseers of the poor, under the name of their accountant and treasurer, is a clerk within the statute. The prisoner acted for several years for the overseers of the parish of Leeds, at a yearly salary, under the name of their accountant and treasurer, and as such received and paid all the money receivable or payable on their account, rendering to them a weekly statement purporting to be an account of monies so received and paid. Having retained a portion of the monies for his own use, he was indicted and convicted of embezzlement; and on a case reserved, the judges were of opinion that he was a clerk and servant within the 39 G. 3. c. 85. *Squires's case, Russ. & Ry.* 349, 2 *Stark.* 349. So where a person, who acted as clerk to parish officers, at a yearly salary voted by the vestry, was charged with embezzlement, as clerk to such officers, no objection was taken. *Tyers's case, Russ. & Ry.* 402. And an extra collector of poor-rates, paid out of the parish funds by a per centage, was held by Richardson J. to be the clerk of the churchwardens and overseers, so as to support an indictment for embezzlement. *Ward's case, Gow,* 168.

Proof of being a person employed for the purpose or in the capacity of a clerk or servant within the statute.] It is sufficient, if it be shown that the prisoner was a person employed, for the purpose or in the capacity of a clerk or servant. The casually procuring a person to receive a sum of money will not render that person "a person employed for the purpose or in the capacity of a clerk or servant." The prisoner was schoolmaster of a charity-school. His appointment was by a committee, of which the prosecutor was treasurer. There was a regular collector to receive the subscriptions to the school. The duty of the prisoner was only to teach the scholars. The prosecutor had been accustomed himself to receive a voluntary contribution to the school, but, being confined to his bed, he left a

written direction for the prisoner to receive it. This was not by order of the committee. The prisoner received, and did not account for the money. Being convicted of embezzlement, the judges, on a case reserved, were unanimously of opinion that the conviction was wrong, inasmuch as the prisoner did not stand in such a relation to the prosecutor, or the committee, as to bring him within the act 7 & 8 G. 4. c. 29. *Nettleton's case*, 1 *Moody, C. C.* 259. So where the prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a *rounds-man*, for a day at a time, and had been several times sent by him to the bank for money; but, upon the day in question, was not working for the prosecutor, and was sent to the bank for money, receiving sixpence for his trouble; having applied the money to his own use, and being indicted for embezzling it, it was held by Parke J. (after conferring with Taunton J.) that the prisoner was not a servant of the prosecutor within the meaning of the act of parliament, and that it was no embezzlement. *Freeman's case*, 5 *C. & P.* 534. The clerk of a chapelry, who receives the sacrament money, is not the servant either of the curate or of the chapelwardens, or of the poor of the township, so as to render a retaining of part of the money collected by him embezzlement. *Burton's case*, 1 *Moody, C. C.* 237. A person was chosen and sworn in, at a court-leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration,) were to collect monies from the commoners and other persons using the commonable lands; to employ the monies so received, in keeping the lands in order; to account, at the end of the year, to two aldermen of the corporation; and to pay over any balance in his hands to his successor in office. In an action for accusing this person of felonious embezzlement, it was held by the Court of Exchequer that the plaintiff was not a clerk or servant within the 7 & 8 G. 4. c. 29. s. 47. Mr. Baron Bayley said, "It appears to me that the statutory provision was intended to embrace persons of a very different description from the plaintiff. From the whole of that provision, it seems to me to have been intended to apply to persons in the ordinary situation of clerks or servants, and having masters to whom they are accountable for the discharge of the duties of their situation. Now, in the present case, is the plaintiff in that situation? and who are his masters? From the evidence, it appears that he was not nominated by the corporation or the commoners, but was appointed to the post of chamberlain at a court-leet. And how can it be said that the corporation or the commoners are his masters, when he does not derive his authority from them?" He then distinguished this case from those of *Squires*, and *Tyers*, (*ante*, *p.* 342,) and thus proceeded: — "In the present case, I think that the plaintiff does not come within the fair meaning of the statute; he is not the servant of another; he fills an office of

his own; he does not receive money in the course of his employment as the mere agent of another; but appears to be entitled, by virtue of his office, to keep the money in his own hands, until the end of the year for which he is appointed." *Williams v. Stott*, 1 *Crom. & Mee.* 675.

Proof of the chattel, money, &c. embezzled.] The chattel, money, or valuable security embezzled by the prisoner must be such as has not come to the possession of his master; if it has come to his possession, the offence is larceny, and not embezzlement. The prisoner received a sum of money from her master to pay his taxes and poor-rates, but did not pay the same; being indicted and convicted of having embezzled the money, on a case reserved, the judges held the conviction wrong. *Elizabeth Smith's case*, *Russ. & Ry.* 267, 2 *Russell*, 213. In a later case the indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzled the same; and upon the evidence, it appeared, that having 2*s.* 6*d.* of his master's money, to pay an account of his master, he only paid one shilling and sixpence, and converted the other shilling to his own use; upon which Park J. directed the jury to acquit the prisoner. *Peck's case*, 2 *Russell*, 213. The prisoner, a clerk in the employment of A. received from another clerk 3*l.* of A.'s money, that he might (amongst other things,) pay for inserting an advertisement in the Gazette. The prisoner paid 10*s.* for the insertion, and charged 20*s.* for the same, fraudulently keeping back the difference. The prisoner having been convicted of embezzlement, on a case reserved, the judges thought the offence not within the statute, because A. had had possession of the money, by the hands of his other clerk, and they thereupon held the conviction wrong. *John Murray's case*, 1 *Moody, C. C.* 276, 5 *C. & P.* 145. As to property coming to the possession of the master, see also *Bazeley's case*, 2 *Leach*, 835, 2 *East, P. C.* 571. Where a servant, who was sent by his master to get change for a 5*l.* note, appropriated the change to his own use, it was held by the judges, that as the master never had possession of the change, but by the hands of the prisoner, this was embezzlement and not larceny. *Sullen's case*, 1 *Moody, C. C.* 129.

In the following case, although the money had been in the possession of the master, and was at the time, in construction of law, still in his possession, the offence was, notwithstanding, held to be embezzlement. The prosecutors suspecting that the prisoner, their servant, had embezzled their money, desired a neighbour to go to their shop and purchase some articles, and they supplied him with three shillings of their own money, which they had marked for the purpose. The neighbour went to the shop, bought the articles, and paid the prisoner for them with the three shillings, which he embezzled. It was contended

for the prisoner, that the money was already in the master's possession, and that the offence, therefore, was not embezzlement. The prisoner being convicted, on a case reserved, the judges held the conviction right, on the authority of *Bull's case*, (2 *Leach*, 841, 2.) in which the judges, upon similar facts, held that a common law indictment could not be supported, and it seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law. *Headge's case*, *Russ. & Ry.* 160, 2 *Leach*, 1033. *See also Whittingham's case*, 2 *Leach*, 912.

Some difficulty formerly arose upon indictments under the 39 Geo. 3. with regard to the money which should be deemed to be embezzled, where the prisoner had received several sums on the same day, and had not accounted for some. The prisoner received on account of his masters 18*l.* in one pound notes; he immediately entered in the books of his employers 12*l.* only as received, and accounted to them only for that sum. In the course of the same day he received 104*l.* on their account, which he paid over to them that evening with the 12*l.* It was urged for the prisoner that this money might have included all the 18*l.* one pound notes, and if so, he could not be said to have embezzled any of them. The prisoner being convicted, on a case reserved, nine of the judges held the conviction right, being of opinion, that from the time of making the false entry, it was an embezzlement. Wood B. doubted whether it could be considered an embezzlement, and Abbott C. J. thought that the point should have been left to the jury, and that the conviction was wrong. *Hall's case*, *Russ. & Ry.* 463, 3 *Stark.* 67.

The halves of country bank notes may be described as "chattels," within the statute. *Mead's case*, 4 *C. & P.* 535. But upon a charge of embezzling so many pounds, it is not sufficient to prove an embezzlement of the same number of bank notes to the same amount. *Lindsey's case*, 3 *Chetw. Burn.* 189. A bank post bill cannot be described as a bill of exchange. *Moor's case*, *Lewin*, *C. C.* 90.

It was held upon the statute 39 Geo. 8, that the indictment ought to set out specially some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of *one pound eleven shillings*, and it did not appear whether the sum was paid by a one pound note and eleven shillings in silver, or by two notes of one pound each, or by a two pound note and change given to the prisoner; on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some article of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong. *Furneaux's case*, *Russ. & Ry.* 335. *Tyer's case*, *Id.* 402. But now by the 7 & 8 Geo. 4. c. 29. s. 48, it is sufficient to allege the embezzlement to be of

money, without specifying any particular coin, or valuable security, and such allegation, so far as it regards the description of property shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved, *vide ante, p.* 338.

Proof of the embezzlement.] The fact of embezzlement by the prisoner must be proved as charged. It is not sufficient to show a bare non-payment. Thus, where a master gave his servant money to pay taxes, and the only evidence of embezzlement was, that the collector had never received the money, the prisoner being convicted of embezzlement, the judges held the conviction wrong, upon the ground that there was not sufficient evidence of the prisoner having embezzled the money; the fact of not having paid the money over to the collector not being evidence of actual embezzlement, but only negativing the application of the money in the manner directed. *Eliz. Smith's case, Russ. & Ry.* 267. The prisoner was clerk to the proprietors of a mail coach, and it was his duty to receive money for passengers and parcels, to enter the sums in a book, and to remit the amount weekly to his employers. He was indicted for embezzling some of the monies thus received; but it appeared that he had entered all the sums in the book, and had made no false entry, but it was imputed to him that he had not forwarded the sums in question to his employers according to his duty; Vaughan B. said, this is no embezzlement, it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony, it is only matter of account. *Hodgson's case,* 3 *C. & P.* 423. So where it appeared by the books of a clerk, that he had received much more than he had paid away, and from this the prosecutors wished it to be inferred, that he must have embezzled some particular note or piece of money; Garrow, B. held that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed. *Hebb's case,* 2 *Russell,* 1242, 1*st ed.*

In general the act of embezzlement cannot be said to take place until the party who has received the money refuses to account, or falsely accounts for it. Where the prisoner received the money in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted for the embezzlement in the former county. On a case reserved, the conviction was held right. Lawrence J. thought that embezzlement being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion, that the indictment might be in Shropshire, where the prisoner received the money, as well as in Staffordshire,

where he *embezzled it*, by *not accounting for it to his master*; that the statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property. *Hobson's case*, 1 *East, P. C. Add.* xxiv. *Russ. & Ry.* 56. The doctrine, that the not accounting is the evidence of the embezzlement, was also laid down in the following case. The prisoner was indicted for embezzling money in Middlesex. It appeared that he received the money in Surrey, and returning into Middlesex, denied, to his master, the receipt of the money. It was objected that he ought to have been indicted in Surrey, and the point was reserved. Lord Alvanley delivering the opinion of the judges, after referring to the last case, said, "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money until he had returned into the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pass them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars-bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, *until he is called upon by the master to account*. When so called upon, he denied that he had ever received it. That was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money. There was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, *until he refused* to account to his master." *William Taylor's case*, 3 *Bos. & Pul.* 596, 2 *Leach*, 974, *Russ. & Ry.* 63. So in *Hall's case*, *Russ. & Ry.* 463, *ante*, *p.* 345, the judges were of opinion, that from the time of *making the false entry*, it was an embezzlement.

Before the late statute, evidence of one act of embezzlement only could be given upon one indictment, and thus the full case upon which the master had determined to prosecute, was frequently prevented from being brought forward. *See* 2 *Russell*, 208. To remedy this inconvenience, the new statute enacts, that the prosecutor may include in the indictment any number of distinct acts of embezzlement, not exceeding three, committed

against himself, within the space of six months from the first to the last of such acts.

Where the indictment only contains one count for one act of embezzlement, and it appears in evidence that the prisoner received money in different sums on different days, the prosecutor must elect one sum and one day upon which to proceed. *Williams' case*, 6 *C. & P.* 626.

Particulars of the embezzlement.] Where a party is charged with embezzlement, the judge before whom the indictment is found, will order the prosecutor to furnish the prisoner with a particular of the charges, upon the prisoner making an affidavit that he is unacquainted with the charges, and that he has applied to the prosecutor for a particular, which has been refused. *Bootyman's case*, 5 *C. & P.* 300. Where three acts of embezzlement were stated in the indictment, the prisoner moved, upon affidavit, for an order directing the prosecutor to furnish a particular of the charges. Notice of the motion had been given. Vaughan B., to whom the application was made, said, "I think you ought to apply to the other side to furnish you with a particular, and if they refuse, I will grant an order. The clause of the 7 & 8 G. 4. c. 29, respecting the framing of indictments for embezzlement, causes great hardship to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach-office, he must have received money from many hundred persons. I should, therefore, recommend the prisoner's attorney to apply to the prosecutor for a particular; and I think that the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial." *Hodgson's case*, 3 *C. & P.* 422. *See also* 1 *Chitty Rep.* 698.

BY PERSONS EMPLOYED IN THE PUBLIC SERVICE.

By 2 W. 4. c. 4. s. 1. (repealing so much of the 50 G. 3. c. 59, as relates to embezzlement by persons to whom any money or securities for money shall be issued for the public service) it is enacted, that if any person employed in the public service of his Majesty, and intrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed

to have stolen the same, and shall in England and Ireland be deemed guilty of felony, and in Scotland of a high crime and offence, and on being thereof convicted in due form of law, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned, with or without hard labour, as to the court shall seem meet, for any term not exceeding three years.

By s. 2. it is enacted, that every tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company, or society, or to any deposit in any savings-bank; and every debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money, whether of this kingdom or of any foreign state; and every warrant or order for the delivery or transfer of any goods or valuable thing, shall, throughout this act, be deemed, for every purpose, to be included under and denoted by the words 'valuable security;' and that if any person so employed and intrusted as aforesaid shall embezzle, or fraudulently apply, or dispose of any such valuable security as aforesaid, he shall be deemed to have stolen the same, within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit, to which such security may relate, or with the money due on such security, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security.

By s. 3. it is enacted, that it shall be lawful to charge in the indictment to be preferred against any offender under this act, and to proceed against him for any number of distinct acts of embezzlement, or of fraudulent application or disposition, as aforesaid, not exceeding three, which may have been committed by him within the space of six calendar months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as it regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved, or if he shall be proved to have embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been

delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and although such part shall have been returned accordingly.

By s. 4. it is enacted, that in every such case of embezzlement, or fraudulent application or disposition, as aforesaid, of any chattel, money, or valuable security, it shall be lawful, in the order of committal by the justice of the peace, before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security, as aforesaid, in the king's majesty.

BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND.

By 15 Geo. 2. c. 13. s. 12, it is enacted, that if any officer or servant of the said company, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with, any such note, bill, dividend warrant, bond, deed, security, money, or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

Provisions similar to the above are contained in the 35 G. 3. c. 66. s. 6. and 37 G. 3. c. 46. s. 4. The 24 G. 2. c. 11. also contains a clause (s. 3.) to the same effect, with respect to officers and servants of the South Sea Company.

Upon a prosecution under the 15 G. 2. c. 13. the prosecutor must prove, 1st, that the prisoner was an officer or servant of the Bank of England, intrusted with a note, &c. belonging to the Bank, or having a bill, &c. deposited with the Bank, or with him, and 2d, that he embezzled, or ran away with the same.

Proof of being an officer, &c. intrusted, &c.] It is not sufficient, in order to bring a party within the statute, that he should be an officer of the Bank, and as such *have access* to the document in question. It must appear also that he was *intrusted* with it. A Bank clerk, employed to post into the ledger, and read from the cash-book, bank-notes in value from 100*l.* to 1000*l.*, and who, in the course of that occupation, had, with other clerks, access to a file upon which *paid notes* of every description were filed, took from the file a paid bank-note for 50*l.* Being indicted for this, under the stat. 15 G. 2. c. 13. s. 12, it was contended that he was not *intrusted* with this note, within

the statute, the only notes with which he could be said to be intrusted being those between 100*l.* and 1000*l.* Having been found guilty, the judges held the conviction wrong, on the ground that it did not appear that he was *intrusted* with the cancelled note, though he had *access* to it. *Bakewell's case, Russ. & Ry.* 35.

Proof of the bills, &c.] Where the prisoner was charged with embezzling "certain bills, commonly called Exchequer-bills," and it appeared that the bills had been signed by a person not legally authorised to sign them, it was held that the prisoner could not be convicted. *Aslett's (first) case*, 2 *Leach*, 954. The prisoner was again indicted under the same statute, for embezzling "certain effects" of the Bank, and being convicted, the judges, on a case reserved, were of opinion that these bills or papers were *effects* within the statute; for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment. *Aslett's (second) case, Russ. & Ry.* 67, 2 *Leach*, 958, 1 *N. R.* 1. In this case, the judges likewise held that the stat. 39 G. 3. c. 85, had not repealed any part of the 15 G. 2. c. 13.

BY BANKERS, AGENTS, OR FACTORS.

The offence of embezzlement by bankers and other persons, intrusted with money, was provided against by the statute 52 G. 3. c. 63; but that statute is now repealed by the 7 & 8 G. 4. c. 27; and its provisions are in substance re-enacted by the 7 & 8 G. 4. c. 29. s. 49, which enacts, that if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction *in writing* to apply such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to

any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as therein-before last mentioned, [transportation for not more than seven years, or imprisonment for not more than three years.]

The above section does not touch the case of trustees and mortgagees, who are expressly excluded from its operation by the succeeding section (50); by which it is provided and enacted, that nothing herein-before contained relating to agents shall affect any trustee, in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

The 51st section of the same statute relates to embezzlements by factors or agents intrusted for the purpose of sale with any goods, &c. It enacts, that if any factor or agent intrusted, for the purpose of sale, with any goods or merchandise, or intrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than

seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent.

The above provisions are not to extend to deprive parties of any remedies which they possessed before their enactment, according to the 52d section of the same statute, by which it is provided and enacted, that nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Upon a prosecution against a banker or agent under this statute, the prosecutor must prove—1, the defendant's character of banker or agent; 2, the intrusting him with the money, or security for money; 3, the directions in writing for the application of the same; and 4, the conversion of the same, in violation of good faith, and contrary to the purpose specified.

The purpose specified is matter of description, and must therefore be proved as laid. Thus an allegation that the prosecutor directed the defendant to invest the proceeds of certain valuable securities in the funds, is not proved by evidence of a direction to invest them in the funds, in the event of an unexpected accident occurring. *White's case*, 4 *C. & P.* 46.

EMBEZZLEMENTS OF MINOR IMPORTANCE.

Statutory provisions are made in cases of various embezzlements, a few of which it will be sufficient to notice briefly in this place.

Embezzling naval or military stores.] By stat. 4 Geo. 4. c. 53. every person who shall be lawfully convicted of stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding, or abetting any such offender, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned and kept to hard labour, in the common gaol or House of Correction, for any term not exceeding seven years. By the 55 G. 3. c. 127. persons employed in the care of military stores embezzling the same, may be tried by a court-martial and transported.

Embezzling warehoused goods.] By stat. 6 Geo 4. c. 112. it is enacted, that if it shall at any time happen that any embezzlement, waste, spoil, or destruction shall be made, of or in any goods or merchandize, which shall be warehoused in warehouses under the authority of that act, by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be guilty of a misdemeanor, and shall, upon conviction, suffer such punishment as may be inflicted by law in cases of misdemeanor.

Embezzlement by pensioners, &c. in Greenwich hospital.] The embezzlement by any pensioner or nurse of Greenwich hospital, of any clothes, &c. belonging to the hospital, is made punishable, by the 54 Geo. 3. c. 110. s. 1, by six months' imprisonment in the gaol of the town, &c. in which such pensioner, &c. shall be apprehended.

ESCAPE.

Proof of escape by the party himself . . . 355
Proof of the criminal custody . . . 355
Proof of escape suffered by an officer . . . 356
Proof of arrest 356
Must be justifiable 356
Proof of voluntary escape 357
Retaking 357
Proof of negligent escape 357
Retaking 358
Proof of escape from the custody of a private person . 358

An escape by a person in custody on a criminal charge may be either with or without force, or with or without the consent of the officer or other person who has him in custody.

Proof of escape by the party himself.] All persons are bound to submit themselves to the judgment of law, and therefore, if any one, being in custody, frees himself from it by any artifice, he is guilty of a high contempt, punishable by fine and imprisonment. 2 *Hawk. P. C. c.* 17. *s.* 5. And if by the consent or negligence of the gaoler, the prison doors are opened, and the prisoner escapes, without making use of any force or violence, he is guilty of a misdemeanor. *Id. c.* 18. *s.* 9. 1 *Hale, P. C.* 611. 1 *Russell*, 367.

Proof of escape—party himself—proof of the criminal custody —venue.] It must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence. Before the passing of the 4 G. 4. c. 64. it was decided that a certificate of the prisoner having been convicted, granted by the officer of the court, was not evidence. *R. v. Smith*, 1 *Russell*, 368. But now, by the 44th sect. of the above statute, it is enacted, that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or

attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced.

Proof of escape suffered by an officer.] In order to render a person suffering an escape liable, as an officer, it must appear that he was a known officer of the law. Thus where the constable of the Tower committed a prisoner to the house of a warder of the Tower, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape. 1 *Chetw. Burn, Escape,* 930. But whoever *de facto* occupies the office of gaoler, is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not. *Hawk. P. C. b.* 2. *c.* 19. *s.* 28.

It is said by Hawkins to be the better opinion that the sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. *Hawk. P. C. b.* 2. *c.* 19. *s.* 28. 1 *Hale, P. C.* 597. 1 *Russell,* 372. But this is opposed to the authority of Lord Holt, who says, that the sheriff is not answerable criminally for the acts of his bailiff. *Fell's case,* 1 *Salk.* 272, 1 *Lord Raym.* 424.

Proof of escape suffered by an officer—proof of arrest.] In case of a prosecution against an officer, either for a voluntary or negligent escape of a prisoner in custody for a criminal offence, it must appear that there was an actual arrest of the offender. Therefore where an officer having a warrant to arrest a man, sees him in a house and challenges him to be his prisoner, but never actually has him in his custody, and the party gets free, the officer cannot be charged with the escape. 2 *Hawk. P. C. c.* 19. *s.* 1. *See Simpson v. Hill,* 1 *Esp.* 431.

Proof of arrest—must be justifiable.] The arrest must be justifiable in order to render the escape criminal; and it is laid down as a good rule, that whenever an imprisonment is so far irregular as that it is no offence in the prisoner to break from it by force, it will be no offence in the officer to suffer him to escape. 2 *Hawk. P. C. c.* 29. *s.* 2. A lawful imprisonment must also be continuing at the time of the escape; and therefore, if an officer suffers a criminal who was acquitted, and

detained for his fees, to escape, it was not punishable. *Id. s.* 3, 4. Yet, if a person convicted of a crime be condemned to imprisonment for a certain time, and *also till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, because it was part of the punishment that the imprisonment should continue till the fees were paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler. *Id. s.* 4.

Proof of voluntary escape.] It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily permitting an escape. The better opinion appears to be that the act must be done *malo animo*, with an intent to defeat the progress of justice. Thus it is said by Hawkins, that it seems agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; neither, he adds, is there any authority to support the opinion that the bailing of one who is not bailable, by a person who has no power to bail, must necessarily be esteemed a voluntary escape. And there are cases in which the officer has knowingly given his prisoner more liberty than he ought, as to go out of prison on promise to return; and yet this seems to have been adjudged to be only a negligent escape. The judgment to be made, adds Hawkins, of all offences of this kind must depend on the circumstances of the case; as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning, and the intention and motives of the officer. *Hawk. P. C. b.* 2. *c.* 19. *s.* 10. 1 *Russell*, 370.

Proof of voluntary escape—retaking.] It is laid down in some books, that after a voluntary escape the officer cannot retake the prisoner, by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 1 *Burn*, 930. title "*Escape*," citing *Dalt. c.* 169. 2 *Hawk. c.* 13. *s.* 9. 1 *Russell*, 372. But Hawkins observes, that the purport of the authorities seems to be no more than this, that a gaoler who has been fined for such an escape shall not avoid the judgment by retaking the prisoner; and he adds, "I do not see how it can be collected from hence that he cannot justify the retaking him." *Hawk. P. C. b.* 2. *c.* 19. *s.* 12.

Proof of negligent escape.] A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrested or imprisoned him, and is not freshly pursued and

taken before he is lost sight of. *Dalt. c.* 159. 1 *Chetw. Burn*, 930, "*Escape.*" Thus, if a thief suddenly, and without the assent of the constable, hang or drown himself, this is a negligent escape. *Id.* It is said by Lord Hale, that if a prisoner for felony breaks the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers that should have prevented it. 1 *Hale*, 600. But upon this passage it has been remarked, that it may be submitted that it would be competent to a person charged with a negligent escape, under such circumstances, to show that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 *Russell*, 371.

Proof of negligent escape—retaking.] Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken, this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. It is scarcely necessary to add, that the sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing him in such a pursuit. *Hawk. P. C. b.* 2. *c.* 19. *s.* 12, 13. 1 *Hale, P. C.* 602.

Proof of escape from the custody of a private person.] The evidence upon an indictment against a private person, for the escape of a prisoner from his custody, will in general be the same as on an indictment against an officer. A private person may be guilty either of a voluntary or of a negligent escape, where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony, (in which case the arrest is only justifiable if a felony be proved,) yet he is punishable if he suffer the prisoner to escape. *Hawk. P. C. b.* 2. *c.* 20. *s.* 2. And if, in such case, he deliver over the prisoner to another private person, who permits the escape, both, it is said, are answerable. *Ibid.* But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. *Id. s.* 3. 1 *Russell*, 377.

FALSE PERSONATION.

Offence at common law . . . 359
Offence by statute 359
Personating bail, acknowledging recovery, &c. . . 359
False personation of soldiers and seamen . . 360

Offence at common law.] The offence of falsely personating another for the purpose of fraud, is a misdemeanor at common law, and punishable as such. 2 *East, P. C.* 1010. 2 *Russell,* 479. In most cases of this kind, however, it is usual, where more than one are concerned in the offence, to proceed as for a conspiracy; and very few cases are to be found of prosecutions at common law for false personation. In one case, where the indictment merely charged that the prisoner personated one A. B., clerk to H. H., justice of the peace, with intent to extort money from several persons, in order to procure their discharge from certain misdemeanors, for which they stood committed, the court refused to quash the indictment on motion, but put the defendant to demur. *Dupee's case,* 2 *East, P. C.* 1010. It is observed by Mr. East, that it might probably have occurred to the court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another, for that it was an attempt to pollute public justice. *Ibid.*

Offence by statute.] In a variety of statutes against forgery, provisions are likewise contained against false personation, which in general is made felony. Thus personating the owner of stock, &c. is made felony, by 1 W. 4. c. 66. s. 7. *Vide post, title "Forgery."*

Personating bail—acknowledging recovery, &c.] By statute 1 W. 4. c. 66. s. 11. if any person shall, before any court, judge, or other person lawfully authorised to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, whether such recognizance or bail in either case be or be not filed; or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, *cognovit actionem,* or judgment, or any deed to be

enrolled, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.

False personation of soldiers and seamen.]—The false personation of soldiers and seamen was made felony by several statutes, the provisions of which are now re-enacted in the 5 Geo. 4. c. 107. by the fifth section of which statute, reciting that, whereas it is expedient that the crime of personating and falsely assuming the name and character of any person entitled to prize money or pension, for the purpose of fraudulently receiving the same, should no longer be punished with death, it is enacted, that, from and after the passing of that act, whosoever shall willingly and knowingly personate or falsely assume the name, or character of any officer, soldier, seaman, marine, or other person entitled, or supposed to be entitled to any wages, pay, pension, prize money, or other allowance of money for service done in his Majesty's army or navy, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer or soldier, seaman, marine, or other person, in order fraudulently to receive any wages, pay, pension, prize money, or other allowances of money due, or supposed to be due, for or on account of the services of any such officer or soldier, seaman or marine, or other person, every such person, being thereof convicted, shall be liable, at the discretion of the court, to be transported beyond seas for life, or for any term of years not less than seven, or to be imprisoned only, or imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years. (See also 10 G. 4. c. 26.)

The statute 5 Geo. 4. as well as the former statutes makes use of the words "some officer, &c. entitled, or supposed to be entitled," &c. Upon a prosecution, therefore, for such false personation, there must be some evidence to show that there was some person of the name and character assumed, who was either entitled, or might, *primâ facie*, at least, be supposed to be entitled to the wages attempted to be acquired. *Brown's case*, 2 *East, P. C.* 1007. Where the prisoner was indicted for personating and falsely assuming the character of Peter M'Cann, a seaman on board the *Tremendous*, and it appeared in evidence that there had been a seaman of the name of M'Carn on board the vessel, but no one of the name of M'Cann; the prisoner being convicted, the judges held the conviction wrong. They were of opinion that "personating" must apply to some person who had belonged to the ship, and that the indictment must charge the personating of some such person. *Tannet's case, Russ. & Ry.* 351.

It has been held that the offence is the same, though the seaman personated was dead at the time of the offence committed. *Martin's case, Russ. & Ry.* 324. *Cramp's case, Id.* 327.

Under the statute 57 Geo. 3. c. 127. it has been held, that all persons present, aiding and abetting a person in personating a seaman, are principals in the offence. *Potts's case, Russ. & Ry.* 353.

FALSE PRETENCES.

Statutory provision 361
What shall amount to a false pretence . . . 362
Not necessary that words should be used . . 366
Goods obtained upon an instrument void in law . 366
Proof of the false pretences 367
Proof of the falsity of the pretence . . . 368
Proof of the intent to cheat or defraud . . . 369
Proof of the obtaining some chattel, money, or valuable security 369
Proof of the ownership of the property . . . 370
Proof of all being principals 371
Defendant not to be acquitted, where the offence appears to be larceny 371
Restitution of the property obtained . . . 371

Statutory provision.] By the 7 & 8 G. 4. c. 29. s. 53, reciting, that a failure of justice frequently arises from the subtle distinction between larceny and fraud, for remedy thereof it is enacted, that if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award. Provided always, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason

thereof, be entitled to be acquitted of such misdemeanor, and no such indictment shall be removable by *certiorari*; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

As many of the cases hereafter cited, were determined upon the repealed statute 30 G. 2. c. 24, it will be useful to give the words of that act, which, after reciting that evil-disposed persons had, by various subtle stratagems, &c., fraudulently obtained various sums of money, goods, &c. to the great injury of industrious families, and to the manifest injury of trade and credit, enacted, that all persons who knowingly and designedly, by false pretence or pretences, should obtain from any person or persons money, goods, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same, should be deemed offenders against law and the public peace, and should be punished, &c.

The ingredients of the offence are the obtaining money, &c. by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient, and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used to effect it, it brings the case within the statute. *Per Buller J. Young's case*, 3 *T. R.* 98.

Where goods are obtained under a false representation, but that representation is in writing, and amounts to a warrant or order for the delivery of goods, within the stat. 1 W. 4. c. 66. s. 10, it is a forgery, and the offender must be indicted for it as such, and cannot be convicted of obtaining the goods under false pretences. Thus where, upon an indictment for obtaining goods by false pretences, it appeared that the prisoner had procured them under the following forged order:—

"Mr. B.—Please to let the bearer have, for J. R., four yards of Irish linen. J. R."

Taunton J. directed the prisoner to be acquitted, saying that the offence was a felony, and not a misdemeanor. *Evans's case*, 5 *C. & P.* 553. *Sed quere* as to this being a forgery. *Vide post, title "Forgery," p.* 417.

The cases illustrating the distinction between false pretences and larceny, will be found under the latter head.

What shall amount to a false pretence.] "The term 'false pretences,' says Mr. East, (2 *P. C.* 828.) is of great latitude, and was used, as Ashurst J. remarked, in *Young's case*, (*supra*,) to protect the weaker part of mankind, because all were not equally prudent; it seems difficult, therefore, to restrain the interpretation of it to such false pretences only, against which ordinary prudence cannot be supposed sufficient to guard. But still it may be a question, whether the statute extends to every false pretence, either absurd or irrational on the face of it, or such as the party has, at the very time, the means of detecting

at hand; or whether the words, which are general, shall be considered co-extensively with the cheat actually effected by the false pretences used. These may, perhaps, be matters proper for the consideration of the jury, with the advice of the court." In the following case, however, the judges appear to have been of opinion, that the want of common prudence and caution on the part of the prosecutor was an answer to the indictment. The prisoner was indicted for obtaining meat from the prosecutor, who was a butcher, under pretence that he would pay for the same on delivery, and would send the money back by the servant of the prosecutor. The jury found a verdict of guilty, and that, at the time the prisoner applied for the meat, and promised to send back the money, he did not intend to return the money, but by that means to obtain the meat and cheat the prosecutor. On a case reserved for the opinion of the judges, they held the conviction wrong, and that it was not a pretence within the meaning of the statute. It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it. *Goodhall's case*, *Russ. & Ry.* 461. But it is no objection that the false pretences merely relate to a future event. Thus where the four prisoners came to the prosecutor, representing that they had betted that a person named Lewis should walk a certain distance within a certain time, and that they should probably win, and thus obtained money from the prosecutor towards the bet, it was objected that, although the representation of a thing past or present, against which caution cannot guard, may be within the statute (30 G. 3. c. 24.) yet, if it be the representation of some *future* transaction, respecting which inquiries may be made, it is not an indictable offence, but the subject only of a civil remedy; the Court of King's Bench, however, were of opinion that false pretences, referring to future transactions, were equally within the statute. *Young's case*, 3 *T. R.* 98.

Where a person, with intent to defraud, gives a check upon a banker with whom he keeps no account, this has been held a false pretence within the statute 30 G. 2. The prisoner, for the purpose of defrauding the prosecutor, gave him, in payment for goods, a check upon a banker with whom he kept no cash and had no account. He was indicted upon the statute 30 Geo. 2. and *Lara's case* (*ante*, *p.* 292,) was cited. *Per Bayley J.* "This point has been recently before the judges, and they were all of opinion that it is an indictable offence, fraudulently to obtain goods by giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid." *Jackson's case*, 3 *Campb.* 370. *Henry Jackson's case*, *York Sum. Ass.* 1830, *coram Bayley*, *J. Matthews' Dig. C. L.* 167.

The prisoner was indicted for a felony. It appeared that she went to a tradesman's house, and said that she came from Mrs. Cook, a neighbour, who would be much obliged if he would let

her have half-a-guinea's worth of silver, and that she would send the half-guinea presently. The prisoner obtained the silver, and never returned, and this was held no felony. It was said to be, in truth, a loan of the silver upon the faith that the amount would be repaid at another time. It might be money obtained under a false pretence. The same determination has been made in similar cases at the Old Bailey. *Coleman's case*, 2 *East, P. C.* 672.

Although there may have been a previous confidence between the parties, yet if the particular money or goods in question were obtained under false pretences, it is an indictable offence within the statute. The prisoner was indicted under the 30 G. 2, for obtaining money under false pretences. The prosecutors were clothiers, and the prisoner, a shearman in their service, and employed as superintendent to keep an account of the persons employed, and the amount of their wages and earnings. At the end of each week he was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such sums, as, according to a written account or note delivered to him by the prisoner were necessary to pay them. The prisoner was not authorised to draw money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorised to pay any sums, except such as he carried in, in his note or account. The prisoner delivered to the prosecutors' clerk, a note in writing, in this form, "9 Sept. 1796, 44*l.* 11*s.* 0*d.*," which was the common form in which he made out the note. In a book in his handwriting, which it was his business to keep, were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum of 44*l.* 11*s.* 0*d.* The prisoner being found guilty, on a case reserved for the opinion of the judges, it was argued that the statute did not extend to cases where there was a previous confidence. At first, there was some diversity of opinion, but finally, they all agreed, that if the false pretence created the credit, the case was within the statute. They considered that the defendant would not have obtained the credit, but for the false account he had delivered in; and, therefore, that he was properly convicted. The defendant, as was observed by one of the judges, was not to have any sum that he thought fit on account, but only so much as was worked out. *Witchell's case*, 2 *East, P. C.* 830.

The indictment charged, that one Barrow, at K., &c., delivered to the prisoner, a common carrier, certain goods to be carried by him from K. to one Leach, at L., there to be delivered, &c.; that the defendant received the goods under pretence of carrying them, and delivering them, and undertook so to do, but that intending to cheat Barrow of his money, he

afterwards unlawfully, &c. pretended to Barrow, that he had carried the goods from K. to L., for the purpose of delivering them to Leach, and had delivered them to Leach at L., and that Leach had given him, the defendant, a receipt expressing the delivery of the goods to him, but that he had lost, or mislaid the same, or had left it at home, and that the defendant thereupon demanded of Barrow 16*s.* for the carriage of the said goods, by means of which false pretences he obtained the money, &c. On a writ of error after conviction, the judgment was affirmed. *Airey's case*, 2 *East, P. C.* 831, 2 *East, R.* 30. The defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was employed by the Duke de Lauzun, to take some horses from Ireland to London, and that he had been detained so long by contrary winds, that all his money was spent; by which representations Sir T. Broughton was induced to advance some money to him, after which it turned out that the defendant never had been employed by the Duke, and that the whole story was a fiction. The defendant was convicted. *Villeneuve's case, coram Moreton C. J., at Chester, cited by Buller J. in Young's case*, 3 *T. R.* 101, 103.

It is said by a writer of authority, that a man cannot be guilty of a forgery, merely by passing himself off as the person whose real signature appears, though for the purposes of fraud, and in concert with such real person, for there is no false making. But this appears to be a false pretence within the statute 30 Geo. 2. c. 24. 2 *East, P. C.* 856.

The mere breach of a warranty, or a false assertion at the time of a bargain, cannot, as it seems, be construed into an obtaining money under false pretences. The indictment stated, that the defendant, by falsely pretending to a person named Varlow, that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grandfather, obtained the sum of 29*l.* 3*s.* 0*d.*, whereas he was not entitled to any interest in any share, &c. (negativing the pretences.) To prove the pretences, a deed assigning the defendant's interest in one-seventh share of the interest to Varlow was put in, and in this deed was contained the usual covenant for title; Littledale J. observed, that a covenant in a deed could not be taken to be a false pretence. The prosecutor stated, that the defendant asked him to purchase a seventh part of some money which he would be entitled to under his grandfather's will, on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and thereupon paid the defendant the purchase money. To prove the falsity of the pretences, a previous assignment by the defendant to a person named Peck, was put in. After argument, Littledale J. said, "The doctrine contended for on the part of the prosecutor would make every breach of warranty, or false assertion, at the time of a bargain, a transportable offence. Here the party bought the

property, and took as his security a covenant, that the vendor had a good title. If he now finds that the vendor had not a good title, he must resort to the covenant. This is only a ground for a civil action." *Codrington's case*, 1 *C. & P.* 661.

What shall amount to—not necessary that words should be used.] The statute 33 Henry 8. c. 1. (now repealed) related to false pretences, by means of a false seal or token, and under the general words "false pretence," in the statute 30 Geo. 3. c. 24, it was held that the offence might be effected by other means than by words. The prisoner was indicted for unlawfully producing to A. B., &c. at the Nottingham post-office, a money order for the payment of one pound to one John Storer, and that he unlawfully pretended to the said A. B. that he was the person named in such order, with intent, &c., whereas, &c. It appeared in evidence, that the prisoner had gone to the post-office, and inquired for letters for John *Story*, whereupon by mistake a letter for John *Storer*, containing the money order, was delivered to him. He remained a sufficient time to read the letter, and then presented the order to A. B., who desired him to write his name upon it, which he did in his real name, John *Story*, and received the money. The terms of the letter clearly explained, that the order could not have been intended for the prisoner, who on being apprehended, denied that he had ever received the money, but afterwards assigned the want of cash as the reason of his conduct; Chambre J. left it to the jury to find against the prisoner, if they were satisfied that he had by his conduct fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of opinion, 1st, that the prisoner writing *his own name* on the order, did not amount to a forgery; and 2dly, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by a false pretence within the statute. *Story's case*, *Russ. & Ry.* 81. *See Freeth's case*, *Id.* 127, *S. P. stated post.*

What shall amount to—goods obtained upon an instrument void in law.] Although the instrument by means of which the prisoner carries his intent to defraud into effect, may be on the face of it illegal, and of no value, yet if the prisoner fraudulently obtains the goods, &c., he may be convicted. The prisoner was indicted in one count upon the statute 30 Geo. 2. c. 24, and in another as for an offence at common law. It appeared in evidence, that the prisoner came to the prosecutor's shop, and asked for a loaf, which he served to him for five pence, that the prisoner then asked him for some tobacco, and the prosecutor served him with an ounce for three pence. The prisoner then threw down a note for ten shillings and sixpence, upon which the prosecutor said, he had no change, but in cop-

per. The prisoner said copper would do. The prosecutor then gave him nine shillings and ten pence in copper, which the prisoner took with the loaf and tobacco, and went away. The note was forged. The same evening, and the following morning, the prisoner put off several similar forged notes. The notes purported to be made by Sparrow, who was a person of good credit, and whose notes under 20*s.* were generally circulated in the neighbourhood. It was contended for the prisoner, that this was not within the statute, which was confined to cases of false suggestions, but it appeared to the learned judge, that the uttering the note as a genuine note was tantamount to a representation, that it was so. It was also objected that a note of this sort being void, and prohibited by law, it was no offence to forge such a note, or to obtain money upon it, when forged, as the party taking it ought to be upon his guard. The learned judge, however, left the case to the jury, who found the prisoner guilty on both counts, and the case was reserved for the opinion of the judges. All being present (except Rooke J.) the majority of them thought that the conviction was right, and that it was a false pretence, notwithstanding the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. Lawrence J. was of a different opinion, and thought that the shopkeeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing, *if true*. *Freeth's case, Russ. & Ry.* 127.

Proof of the false pretences.] The pretences, which must be distinctly set out in the indictment, 2 *Russ.* 309, must be proved as laid. Where, in the averment of the pretence, it was stated, "that the defendant pretended that *he had paid* a certain sum into the Bank of England," and the witness stated, that the words used were, "the money has been paid at the bank," Lord Ellenborough said, "In an indictment for obtaining money by false pretences, the pretences must be distinctly set out, and at the trial they must be proved as laid. An assertion, that money had been paid into the bank, is very different from an assertion, that it had been paid into the bank by a particular individual. The defendant must be acquitted." *Plestow's case*, 1 *Campb.* 494. But where the indictment charged, that the defendant having in his custody a *certain parcel* to be delivered, &c. for which he was to charge 6*s.*, delivered a ticket for the sum of 9*s.* 10*d.* by means, &c., and it appeared in evidence that the parcel mentioned in the indictment was a *basket* of fish, it was objected that this was a variance, but Lord Ellenborough overruled the objection, saying, that a basket answered the general description of a parcel well enough, but that if the indictment had been on the 39 Geo. 3. c. 58, (which enacts, that if any porter,

or other person employed in the porterage, or delivery of boxes, *baskets*, packages, *parcels*, trusses, game, or other things, shall take any greater sum, &c.) it would have been a fatal variance. *Douglas's case*, 1 *Campb.* 212.

The rule that the false pretences averred in the indictment must be proved as laid, is subject to the qualifications that *all* the pretences need not be proved, but that a single false pretence, proved as laid, though joined with others, is sufficient to support the indictment. The defendant was indicted under the 30 Geo. 2, for obtaining money under pretence of assisting two seamen to procure a pension, and it was alleged that he pretended that "two guineas must be sent up to the under clerks as fees, *which they always expected, and that nothing could be done without it.*" The part of the pretences printed in italics was not proved, and it was objected that this was a fatal variance, but the defendant being convicted, the judges held the conviction right. *Hill's case*, *Russ. & Ry.* 190. *See also Perrott's case*, 2 *M. & S.* 379. Where the false pretences are contained in a letter, and such letter has been lost, the prisoner, after proof of the loss, may be convicted on parol evidence of its contents. *Chadwick's case*, 6 *C. & P.* 181.

Proof of the falsity of the pretence.] The falsity of the pretence must clearly appear on the prosecutor's evidence, and must not be left to inference. The prisoner bought from the prosecutor at Rugeley fair a horse for 12*l.*, and tendered him in payment notes to that amount on the Oundle bank. On the prosecutor objecting to receive these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the horse. The prisoner was indicted for obtaining the horse by false pretences, *viz.* by delivering to the prosecutor certain papers purporting to be promissory notes, well knowing them to be of no value, &c. It appeared in evidence, that these notes had never been presented by the prosecutor at Oundle, or at Sir J. Esdaile's in London, where they were made payable. A witness stated, that he recollected Rickett's bank at Oundle stopping payment seven years before, but added, that he knew nothing but what he saw in the papers, or heard from the people who had bills there. The notes appeared to have been exhibited under a commission of bankrupt against the Oundle bank. The words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them. The jury found the prisoner guilty, and said, they were of opinion, that when the prisoner obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor. On a case reserved, the judges held the conviction wrong, and that the evidence was defective in not sufficiently proving that the notes were bad. No opinion was given, whether

this would have been an indictable fraud, if the evidence had been sufficient. *Flint's case, Russ. & Ry.* 460. The defendants were indicted for obtaining money under the false pretence of their being collectors of the property tax. It appeared in evidence, that they had in fact been appointed collectors by the commissioners, but that their appointment was informal. This was held not be a false pretence within the statute, 30 Geo. 2. c. 24. *Dobson's case,* 7 *East,* 218. The defendant was indicted for obtaining money by falsely pretending that a note purporting to be the promissory note of Coleman, Smith, and Morris, was a good and available note of C. S. & M., whereas it was not a good and available note. The defendant gave the note to the prosecutor in payment for meat. A witness proved that he had told the defendant that the Leominster Bank (from which the note issued) had stopped payment. It was also proved that the bank was shut up, and that Coleman and Morris had become bankrupts; but it appeared that Smith, the third partner, had not become bankrupt. Gaselee J. said, that upon this evidence, the prisoner must be acquitted, because, as it appeared, that the note might ultimately be paid, it could not be said that the defendant was guilty of a fraud in passing it away. *Spencer's case,* 3 *C. & P.* 420.

Proof of intent to cheat or defraud.] It must appear that the defendant obtained the money, &c., with intent to cheat or defraud some person of the same. Thus, where in an indictment for obtaining money under false pretences, the allegation of the obtaining the money did not state that it was with intent, &c., the judges, on the point being reserved for their consideration, were of opinion that the indictment was bad. *Rushworth's case, Russ. & Ry.* 317, 1 *Stark.* 396. The primary intent must be to cheat and defraud. Thus where the prisoner was indicted for having procured from the overseer of a parish, from which he received parochial relief, a pair of shoes, by falsely pretending that he could not go to work because he had no shoes, when he had really a sufficient pair of shoes, and it appeared in evidence, that on the overseer bidding him to go to work, he said he could not, because he had no shoes, upon which the overseer supplied him with a pair of shoes, whereas the prisoner had a pair before, the prisoner being convicted, the case was considered by the judges, who held that it was not within the act, (30 G. 3. c. 24.) the statement made by the prisoner being rather a false excuse for not working, than a false pretence to obtain goods. *Wakeling's case, Russ. & Ry.* 504.

Proof of the obtaining some chattel, money, or valuable security.] In order to render it an offence within the statute, the

property obtained must come within the description of "*chattel, money, or valuable security.*" An unstamped order for the payment of money, which ought to be stamped under 55 G. 3. c. 184, is not a valuable security within the statute. *Yates's case*, 1 *Moody, C. C.* 170.

Obtaining credit with a banker by false pretences, and thus procuring him to pay drafts to third persons, is not an obtaining money, chattel, or valuable security within the 7 & 8 G. 4. c. 29. The defendant was indicted for obtaining money under false pretences. The first count stated the false pretences by which the defendant procured the prosecutors to cash a check in favour of one Jacob, and concluded thus, "and obtained from them the amount of the check to be paid to the said Jacob, and further advances to him to answer other checks drawn by him on the prosecutors, *viz.* &c., with intent," &c. In the second count it was alleged, that the defendant by means, &c., obtained a large sum of money, to wit, &c., from the prosecutors, and also the check mentioned to be paid to the said Jacob, with intent, &c. It appeared in evidence, that in order to induce the prosecutors, who were the defendant's bankers, to give him credit, and honour his checks, he delivered to them a bill drawn by him upon a person with whom he had no account, and which had no chance of being paid. The prosecutors paid the amount of the check to Jacob. The defendant was convicted, and on a case reserved for the opinion of the judges, they were of opinion that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained was credit on account, and they therefore held the conviction wrong. *Wavell's case*, 1 *Moody, C. C.* 224.

Proof of the ownership of the property.] The property obtained by means of the false pretences, must be proved to be the property of the party mentioned in the indictment. The prisoner was indicted for obtaining the sum of 3*s.* 4*d.* of the monies of the Countess of Ilchester. It appeared in evidence, that the prisoner brought a basket of fish which he delivered to the servant of the countess, with a false ticket, charging 3*s.* 4*d.* too much for the carriage. The servant paid him the full amount, and was repaid by Lady Ilchester. On it being objected that at the time of payment, this was not her money, Lord Ellenborough said, that her subsequent allowance did not make the money paid to the defendant her money at the time. She was not chargeable for more than was actually due for the carriage, and it depended upon her whether she should pay the overplus. The servant, however, afterwards swore that at the time of this transaction he had in his hands upwards of 9*s.* 10*d.*, (the whole sum charged) the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. *Douglas's case*, 1 *Campb.* 212.

Proof of all being principals.] Where several persons were indicted for obtaining money under false pretences, it was objected, that although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another; but that each was answerable for himself only, the pretence conveyed by words being like the crime of perjury, a separate act in the person using them; the Court of King's Bench, however, held, that as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly. *Young's case*, 3 *T. R.* 98.

Defendant not to be acquitted where the offence appears to be a larceny.] By the 7 & 8 G. 4. c. 29. s. 53, (*vide post*,) if it appears on the trial that the defendant obtained the property in question, in any such manner as to amount in law to larceny, he shall not be entitled to be acquitted by reason thereof. In all cases, therefore, where it is doubtful whether in point of law the offence is a larceny, or a misdemeanor, the safest course is to indict the party as for a misdemeanor, for should it appear upon an indictment for larceny, that the offence is in fact that of obtaining money, &c., under false pretences, the prisoner must be acquitted.

Restitution of the property obtained.] The Court had not the power, formerly, of ordering the restitution of property obtained by false pretences, the statute 21 Hen. 8. c. 11. extending only to stolen property. But now by statute 7 & 8 G. 4. c. 28. s. 57, it is enacted, that in cases of misdemeanors the Court may have power to award the restitution of the property. *See this section, stated post.*

FISH;

TAKING OR DESTROYING FISH.

It will be seen (*post, title "Larceny,"*) that larceny might be committed at common law of fish in a trunk or net, or as it seems in any inclosed place, where the owner might take them at his will. 2 *East, P. C.* 610. But it was no larceny to take fish in a river, or other great water, where they were at their natural liberty. *Hawk. P. C. b.* 1. *c.* 33. *s.* 39. Property of this kind was protected by various statutes, (4 & 5 W. 3. c. 23. s. 5. 22 & 23 Car. 2. c. 25. s. 7. 9 Geo. 1.

c. 22. 5 Geo. 3. c. 14,) but those statutes are now repealed by the 7 & 8 Geo. 4. c. 27, and the substance of them is re-enacted in the 7 & 8 Geo. 4. c. 29. By s. 34, it is enacted, that if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed (if any,) such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing herein-before contained shall extend to any person angling in the day-time; but if any person shall by angling in the day-time unlawfully and wilfully take or destroy, or attempt to take or destroy any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any such sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is herein-before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

And by section 35, it is enacted, that if any person shall at any time be found fishing, against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be so found, his servants, or any person authorised by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time, against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.

And by section 36, it is enacted, that if any person shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently

marked out or known as such, every such offender shall be deemed guilty of larceny, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be guilty of a misdemeanor, &c., and it shall be sufficient in any indictment or information to describe either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided always, that nothing therein contained, shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine, adapted for taking floating fish only.

FORESTALLING, &c.

The offence of forestalling, with which may likewise be considered those of engrossing and regrating, is defined to be every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals, or other merchandize. 3 *Inst.* 196, 3 *Bac. Ab.* 261, 1 *Russ.* 169. All endeavours whatever to enhance the common price of any merchandize, and all kinds of practice which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, are offences at common law, and come under the general notion of forestalling, which includes all kind of offences of this nature. *Hawk. P. C. b.* 1. *c.* 80. *s.* 1. These offences were rendered punishable by several old statutes, but those acts were repealed by the 12 Geo. 3. c. 71.

In modern times prosecutions have seldom been instituted for any of these offences; but in the following case an information for enhancing the price of hops was sustained. The defendant was charged in the first count with spreading false rumours, with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., with intent to induce them not to bring their hops to market for sale, and thereby greatly to enhance the price. It appeared that the defendant having a stock of hops on hand, declared to the sellers that they were too cheap, and to the planters that they had not a fair price for their hops, and contracted for one-fifth

of the produce of Worcestershire and Herefordshire, where he had a stock in hand, and admitted that he did not want to purchase. The defendant being convicted, moved in arrest of judgment, but the Court refused the motion. *Waddington's case*, 1 *East*, 143.

Upon a prosecution for an offence of this nature, the prosecutor must prove, 1st, the act of forestalling, regrating, &c.; and 2dly, the object with which that act was done. It must appear that he has made his purchases, not in the fair course of dealing, with a view of afterwards dispersing the goods in proportion to the wants and conveniences of the public, but with a view to enhance the price of the commodity, and to deprive the people of their ordinary subsistence, or compel them to purchase it at an exorbitant price. *Per Lord Kenyon*, *Waddington's case*, 1 *East*, 143.

FORCIBLE ENTRY AND DETAINER.

Offence at common law 374
Offence by statute 374
Proof of the entry 376
Proof of the force and violence 376
Proof that the detainer was forcible . . . 377
Proof of the possession upon which the entry was made . 378
Proof that the offence was committed by the defendant . 378
Award of restitution 379

Offence at common law.] It seems that entering with such force and violence into lands or tenements, as to exceed a bare trespass, was an offence indictable at common law. *Wilson's case*, 8 *T. R.* 357, 1 *Russell*, 283. But against this offence provision has been made by various statutes.

Offence by statute.] The first enactment against forcible entries is that of 5 Rich. 2. c. 8, which merely forbids them.

By the 15 Rich. 2. c. 2, it is accorded and assented, that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements, or

other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs, or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden and kept, and fully executed, joined to the same that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of the peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made, and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king.

This statute was followed by that of 8 Hen. 6. c. 9, which after reciting the 15 Rich. 2. c. 2, enacts, for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained, if the sheriff do not obey the commandments and precepts of the said justices, for to execute the said ordinances, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments, and discontinuances, sometimes made to lords, and other puissant persons, and extortioners, within the said counties where they be conversant, to have maintainance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf; enacts, that from henceforth, where any doth make any forcible entry on lands and tenements, or other possessions, or them hold forcibly, after complaint thereof made within the same county, where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time, shall cause, or one of them shall cause, the said statutes duly to be executed, and that at the costs of the party so grieved.

By section 10 of this statute, the justices are directed to re-seize the lands or tenements entered upon, and to put the party put out into full possession of the same. But it is provided, that they who keep their possession with force, in any lands and tenements whereof they or their ancestors, or they whose estate they have continued their possession in the same, for three years or more, be not endamaged by the statute. This proviso is enforced by the 31 Eliz. c. 11. s. 3, which declares, that no restitution shall be made, if the person indicted has had the occupation or been in quiet possession for the space of

three whole years together, next before the day of the indictment found, and his estate therein not ended or determined.

In order to extend the remedy for forcible entries upon other estates than those of freehold, it was, by 21 Jac. 1. c. 15. enacted, that such judges, justices, or justice of the peace, as, by reason of any act or acts of parliament now in force are authorised and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth, (upon indictment of such forcible entries, or forcible withholding before them duly found,) to give like restitution of possession unto tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force.

Upon a prosecution under these statutes, the prosecutor must prove—1, the entry or detainer; 2, that it was forcible; 3, the possession upon which the entry was made; and 4, that it was made by the defendant.

Proof of the entry.] A forcible entry or detainer is committed by violently taking or keeping possession of lands or tenements, by menaces, force, and arms, and without the authority of law. 4 *Bl. Com.* 148. It must be accompanied with some circumstances of actual violence or terror, and therefore an entry, which has no other force than such as is implied by law in every trespass, is not within the statutes. *Hawk. P. C. b.* 1. *c.* 64. *s.* 25. The entry may be violent, not only in respect to violence actually done to the person of a man, as by beating him, if he refuse to relinquish possession, but also in respect to any other kind of violence in the entry, as by breaking open the doors of a house, whether any person be within or not, especially if it be a dwelling-house, and perhaps by acts of outrage after the entry, as by carrying away the party's goods. *Ibid. s.* 26. *See* 3 *Burr.* 1702, (*n.*) *post*, 377.

But if a person, who pretends a title to lands, barely goes over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for such like purposes, without doing any act which expressly or impliedly amounts to a claim to such lands, this is not an entry within the meaning of the statutes. *Hawk. P. C. b.* 1. *c.* 64. *s.* 20. Drawing a latch and entering a house is said not to be a forcible entry, according to the better opinion. *Id. s.* 26. *Bac. Ab. Forcible Entry*, (*B*). 1 *Russell*, 288.

Proof of the force and violence.] Where the party, either

by his behaviour or speech, at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions which plainly imply a purpose of using force against those who make resistance. *Hawk. P. C. b.* 1. *c.* 64. *s.* 27. But it seems that no entry is to be judged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any similar damage, which is not personal. *Id. s.* 28. *Sed vide ante, p.* 376.

It is not necessary that there should be any one assaulted to constitute a forcible entry; for, if persons take or keep possession of either house or land, with such numbers of persons and show of force as are calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer. *Per Abbott, C. J. Milner v. Maclean,* 2 *C. & P.* 18. *See also Smyth's case,* 5 *C. & P.* 201.

Proof that the detainer was forcible.] The same circumstances of violence or terror which make an entry forcible will make a detainer forcible also; therefore, whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he return, shall be adjudged guilty of a forcible detainer, though no attempt is made to re-enter; so also, it is said, if he place men at a distance from the house, to assault any one who shall attempt to make an entry; but barely refusing to go out of a house, and continuing therein in despite of another, is not a forcible detainer. *Hawk. P. C. b.* 1. *c.* 64. *s.* 30. So where a lessee at the end of his term, keeps arms in his house to prevent the entry of the lessor, or a lessee at will retains possession with force, after the determination of the will; these are forcible detainers. *Com. Dig. Forc. Det.* (*B.* 1.)

The statute 15 Ric. 2. only gave a remedy in cases of forcible detainer, where there had been a previous forcible entry; but the statute 8 Hen. 6. c. 9. gives a remedy for forcible detainer after a previous *unlawful* entry; for the entry may be unlawful though not forcible. *Oakley's case,* 4 *B. & Ad.* 307. But it does not hence follow that the statute 8 Hen. 6. does not apply to the case of a tenant at will or for years, holding over after the will is determined, or the term expired; because the continuance in possession afterwards may amount, in judgment of law, to a new entry. *Per Parke, J. Id. p.* 312, *citing Hawk. P. C. b.* 1. *c.* 64. *s.* 34.

Proof of the possession upon which the entry was made.] With regard to the kind of entry, in respect of which a person may be guilty of a forcible entry, it is said by Hawkins to be a general rule, that a person may be indicted for a forcible entry into such incorporeal hereditaments, for which a writ of entry will lie either at common law, as for rent, or by statute, as for tithes; but that there is no good authority that such an indictment will lie for a common or an office. So no violence offered in respect of a way or other easement, will make a forcible entry. *Hawk. P. C. b.* 1. *c.* 64. *s.* 31. Nor can a person be convicted under the 15 Ric. 2, of a detainer of any tenements, into which he could not have made a forcible entry. *Ibid.*

It is said by Hawkins, that it seems clear that no one can come within the intention of the statutes, by any force whatsoever done by him, on entering into a tenement whereof he himself had the sole and lawful possession both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it; or by forcibly entering into the land of his own tenant at will. The learned writer has added a "*sed quære*" to this passage, and Lord Kenyon has observed, that perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. *Wilson's case*, 8 *T. R.* 361.

The possession of a joint tenant, or tenant in common, is such a possession as may be the subject of a forcible entry or detainer by his co-tenant, for though the entry of the latter be lawful *per mie et per tout*, so that he cannot in any case be punished for it in an action of trespass, yet the lawfulness of the entry is no excuse for the violence. *Hawk. P. C. b.* 1. *c.* 64. *s.* 33.

Upon an indictment founded on the 8 Hen. 6, it must be shown that the entry was upon a freehold; and if founded on the 21 Jac. 1, that it was upon a leasehold, &c., according to that statute. *Wannop's case, Sayer*, 142. On a prosecution for a forcible entry on the possession of a lessee for years, it is sufficient to prove that such lessee was *possessed*, although the indictment allege that the premises were his *freehold*. *Lloyd's case, Cald.* 415. Proof that the party holds colourably, as a freeholder or leaseholder, will suffice, for the Court will not, on the trial, enter into the validity of an adverse claim, which the party ought to assert by action and not by force. *Per Vaughan B., Williams's case, Talf. Dick. Sess.* 239.

Proof that the offence was committed by the defendant.] This offence may be committed by one person as well as by several. *Hawk. P. C. b.* 1. *c.* 64. *s.* 29. All who accompany a man when he makes a forcible entry, will be adjudged to enter with

him, whether they actually come upon the land or not. *Id. s.* 22. So also will those who, having an estate in land by a defeasible title, continue by force in possession, after a claim made by one who has a right of entry. *Id. s.* 23. But where several come in company with one who has a right to enter, and one of the company makes a forcible entry, that is not a forcible entry in the others. 3 *Bac. Ab. Forcible Entry*, (*B.*) And a person who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he no way concurred in, or promoted the force. *Hawk. P. C. b.* 1. *c.* 64. *s.* 24.

An infant or fême-covert may be guilty of a forcible entry, for actual violence done by such party in person; but not for violence done by others at their command, for such command is void. A fême-covert, it is said, may be imprisoned for such offence, though not an infant, because he shall not be subject to corporal punishment, by force of the general words of any statute in which he is not expressly named. *Hawk. P. C. b.* 1. *c.* 64. *s.* 35. A fême-covert may be guilty of a forcible entry, by entering with violence into her husband's house. *Smyth's case*, 5 *C. & P.* 201.

Award of restitution.] The Court in which the indictment is found, or the Court of King's Bench upon the removal thither of the indictment by *certiorari*, has power on the conviction of the defendant to award restitution to the party upon whose possession the entry has been made. *Hawk. P. C. b.* 1. *c.* 64. *s.* 49, 50, 51. Though by the provisos in the statutes of Hen. 6, and James 1, the defendants may set up a possession for three years to stay the award of restitution. *Id. s.* 53. A supersedeas of the award of restitution may be granted by the same Court that made the award. *Id. s.* 61. And a re-restitution may be awarded by the King's Bench. *Id. s.* 66.

Witnesses.] The tenant of the premises is not a competent witness. *Williams's case*, 9 *B. & C.* 549. *Beavan's case, Ry. & Moo.* 242, *ante, p.* 107.

FORGERY.

Forgery at common law 381
Proof of the false making 383
In the name of the party—assuming the name of a person in existence . . . 383
Party forging having the same name . 383
Fictitious name . . . 385
Assumed and borne by the party forging . 387
Proof of the false making—with regard to the apparent validity of the matter forged . . 391
Substantial resemblance to true instrument . 393
Cases of non-resemblance . . 395
Proof of the act of forging . . . 397
Proof of the uttering 397
Proof of the disposing or putting off . . 398
Proof of the intent to defraud . . . 400
With regard to the party intended to be defrauded 401
Proof of identity of the party whose name is forged . 403
Proof of the forged instrument . . . 405
Proof with regard to principals and accessories . 408
Proof of guilty knowledge . . . 409
Witnesses 409
Venue 409
Forgery of instruments not made, or purporting to be not made in England . . . 410
Interpretation clause 411
Punishment 411
Forgery of particular instruments . . . 412
Forging wills 413
Forging deeds 413
Proof of forging of bills of exchange—promissory notes and warrants, or orders for payment of money or delivery of goods . . 414
Proof of forging bills of exchange, &c. . 414
Proof of forging warrants, &c. . . 415
Forging receipts 421

Forgeries relating to the public funds . . 425
False entries in books of bank and transfer in false name . . . 425
Proof of forging transfer of stock, and power of attorney to transfer . . . 425
Proof of personating owner, and endeavouring to transfer stock . . . 426
Proof of forging attestation to power of attorney or transfer of stock . . . 427
Proof of clerks in the Bank making out false dividend warrants . . . 427
Proof of forging exchequer bills, East India bonds, &c. 428
Forgery and similar offences with regard to bank notes . 428
Proof of purchasing, receiving, &c., forged Bank notes . . . 428
Proof of making or having moulds, &c. . 428
Proviso as to paper for bill of exchange . 429
Proof of engraving any Bank note, &c. . 430
Proof of engraving any word, &c. . . 430
Proof of making, &c., mould for manufacturing paper 431
Proof of engraving bill of exchange, &c. . 431
Forgery of entries in public registers . . 432
Forgery of stamps 434
Forgery of other public documents . . 437

Under the present head will first be stated, the law of forgery, as it regards all forged instruments, with the general proofs necessary to establish the act of forging, uttering, &c. The evidence required to prove the forgery of particular documents, both private and public, will then be given.

Forgery at common law.] At common law the offence of forgery was punishable as a misdemeanor. It is defined by Sir W. Blackstone as "the fraudulent making or alteration of a writing to the prejudice of another man's right;" 4 *Com.* 247; and by Mr. East, as "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 *East, P. C.* 852.

With regard to the nature of the instruments or writings, the forging of which is punishable at common law, it has been held that the falsification of records and other matters of a public nature is a misdemeanor, as a privy seal; 1 *Roll. Ab.* 68; a licence from the Barons of the Exchequer to compound debts; *Id.* 65; *Gregory v. Wilks*, 2 *Bulst.* 137; a parish register; *Hawk. P. C. b.* 1. *c.* 70; or a certificate of holy orders, or

any matter of record. *Hawk. P. C. b.* 1. *c.* 70. *s.* 9, 10. So a forged letter, in the name of a magistrate, the governor of a goal, directing the discharge of a prisoner, has been held to be a forgery. *Harris's case*, 6 *C. & P.* 129. *And see Fawcett's case*, 2 *East, P. C.* 862, *infra.*

So with regard to private writings, it is an offence at common law to forge a deed or will. *Hawk. P. C. b.* 1. *c.* 70. *s.* 10. And though doubts were formerly entertained on the subject, it is now clear that forging any private document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule. Thus, after much debate, it was held that forging an order for the delivery of goods was a misdemeanor at common law. *Ward's case, Str.* 747, 2 *Ld. Raym.* 1461. And the same was held by a majority of the judges, with regard to a document purporting to be a discharge from a creditor to a gaoler, directing him to discharge a prisoner in his custody. *Fawcett's case*, 2 *East, P. C.* 862. *Ward's case* is considered by Mr. East to have settled the rule, that the counterfeiting of *any writing* with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 *East, P. C.* 861.

Upon an indictment for forgery at common law, it must appear in the indictment what the instrument is, in respect of which the prisoner is charged. The prisoner was indicted for forging a certain paper instrument in the words and figures following :—

" Fol. 44. 4. Sarum public weighing engine, July 27, 1802. One load of coals from Mr. Wilcox to Mr. Webb.

	Ton.	Cwt.	Qrs.	lb.
Gross	1	11	3	0
Tare	0	6	0	0
	1	5	3	0

Witness, W. Wort, book-keeper."

With intent to defraud John Webb. It appeared that the prisoner had altered this instrument, so as to render the prosecutor liable to pay more than it originally expressed. The prisoner being convicted, the judges, on a case reserved, were of opinion that the indictment was bad, as it did not state what the instrument was, in respect of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it. *Wilcox's case, Russ. & Ry.* 50.

It is not necessary to the sustaining an indictment for forgery at common law, that any prejudice should in fact have happened by reason of the fraud. *Ward's case, Str.* 747, 2 *Ld. Raym.* 1461. Nor is it necessary that there should be any publication of the forged instrument. 2 *East, P. C.* 855, 951, 1 *Russell*, 318.

Proof of the false making—in the name of the party—assuming the name of a person in existence.] The most usual kind of forgery is, where the party assumes the name and character of a person actually in existence, and by means of the credit attached thereto, carries his fraud into effect; as in the following case. The prisoner, whose name was Hadfield, appeared in the neighbourhood of the lakes of Cumberland, calling himself the Hon. Alexander Augustus Hope, brother of the Earl of Hopetown, and in that name imposed upon several persons in the neighbourhood. During his residence near the lakes, he drew a bill upon a gentleman in the neighbourhood, which would have been paid, had not the prisoner been detected. For this forgery he was indicted, convicted, and executed. *Hadfield's case*, 6 *Ev. Stat.* 580, 2 *Russell*, 327. The adoption of a false *description* and *addition*, where a false name is not assumed, and there is no person answering the description, has been held not to be forgery. *Webb's case, Russ. & Ry.* 405.

Of the false making—in the name of the party—party forging having the same name.] A man may be guilty of forgery by the fraudulent making of an instrument, though in his own name; as if he makes a feoffment of lands to J. S., and afterwards a deed of feoffment of the same lands to J. D., of a date prior to that of the feoffment to J. S. *Hawk. P. C. b.* 1. *c.* 70. *s.* 2. And the offence, it is said, would have been the same, if he had passed only an equitable interest for a good consideration, and had afterwards by such a subsequently antedated conveyance endeavoured to avoid it. *Id.* So if a bill of exchange, payable to A. B. or order, come to the hands of a person named A. B. (not the payee) who fraudulently indorses it for the purpose of obtaining the money, this is a forgery. *Mead v. Young*, 4 *T. R.* 28. The prisoner, whose name was Thomas Browne, was charged together with Matthias Parkes with forging a promissory note, purporting to be made by Thomas Browne. It appeared that the prisoner Browne had passed the note in question to a tradesman, representing it to him as the note of his brother. The note was dated at Roughton, Salop, and was made payable at Thornton and Co., bankers, London. It was proved that there was no person of that name and description residing at Roughton, and that no such person kept an account at Thornton and Co.'s. It was objected for the prisoner Browne, that the note being made in his own name, could not be a forgery; but the judges on a case reserved, held that he had been properly convicted. Grose J., in delivering their opinion, said, "The prisoner, at the time he uttered the note, did not utter it as his own note, but as the note of his brother, of the same name; but there is no brother of the prisoner of the name of *Thomas Browne* existing, and,

therefore, this is the false making of a note in the name of a non-existing person, for it is equally a forgery, whether the non-existing person be described as bearing the name of the person uttering the note, or another name. The prisoner, therefore, although his name is Thomas Browne, having uttered the note, describing the signature as the name of another person, is as guilty of having uttered a forged note, as if he had uttered a note on which any other name whatever had been forged." *Parke's and Brown's case*, 2 *Leach*, 775, 2 *East*, *P. C.* 963. The authority of this case has been doubted by Mr. Evans, who has observed, that it appears to rest on very questionable principles, and in opposition to it, he cites the following case. A bill of exchange was made by the prisoner, D. Walker, (a pauper at Manchester). It was dated Liverpool, signed D. Walker and Co., and drawn on Devayne's and Co., London. Similar bills had been before drawn in the same manner, and regularly paid, though the drawer was unknown to that house. *Parkes' & Brown's case* (*supra*) was cited; but the learned judge ruled, that there was not evidence sufficient to go to the jury. *Walker's case, coram Chambre J. Lanc.* 6 *Evans's Stat.* 580. In support of his opinion, Mr. Evans refers to *Hevey's case*, 1 *Leach*, 229, (*vide post*, *p.* 405,) where a prisoner, who had assumed to be the real indorser of the bill, was held not to be guilty of forgery, there being no false making; but upon this, it may be observed, that the fact of there being no false making in the latter case, seems to distinguish it entirely from *Brown's case*, and to prevent its being considered an authority against that decision. An eminent writer has made the following comments upon *Brown's case*. "In the abstract it amounts to this, that a man who signs his own name to a note, dated at a place where he does not reside, and payable at a banker's where he has no money, is guilty of forgery. It is remarkable that the jury did not expressly find an intention on the part of the prisoner, at the time of the making, to utter it as the note of a third person. If the note contained a mere promise to pay, (without place of date or payment) signed by the prisoner, and was afterwards uttered by him as the note of another, the case would be more doubtful. See also *R. v. Webb*, 3 *B. & B.* 228." 2 *Stark. Ev.* 333 (*n.*) 2*d ed.* A point similar to that upon which *Browne's case* turned, occurred in the following case, but was not decided. The prisoner, George Maddocks, was charged with forging the following indorsement upon a bill:—

"*Per pro. for Rob. Falcon, George Maddocks.*"

It appeared that he was clerk to an attorney, and had authority to open letters, receive money, and to do what was necessary in case a writ was wanted; but he had no authority to indorse a bill. The bill in question was sent in a letter to the prosecutor's chambers, where the letter was opened by the prisoner, who after writing upon the bill the indorsement men-

tioned above, took it to the bank, and received payment. He gave a receipt, " Received for R. F. (his master's real name,) G. M." On the following day he wrote to his master, stating he had taken the bill for *acceptance*, though at that time he had received the money. He then absconded. On his trial he said, he received the money for his master's use, and did not intend to apply it otherwise. The judge left it to the jury to say, whether the prisoner meant only to receive the money for his master's use, and acted under a supposition, in the situation of trust in which he was placed, that he had a right to describe himself as acting by procuration, or whether he made the indorsement and received the money, for the purpose of defrauding the prosecutor or the bank. The jury were of opinion that it was for the purpose of fraud, and referred to the letter in which the prisoner spoke of having taken the bill for *acceptance*; and found him guilty. As it did not appear that the prisoner had offered to make use of the indorsement to transfer the bill to any other person, or to enable himself to receive the contents as bearer or holder, having on the contrary given the receipt in his own name for the use of his master, a doubt arose, whether the indorsement was such an " indorsement" as was meant by the statute. The question, whether, under the special circumstances of his conduct, the prisoner ought to have been acquitted, or whether a false assertion in an indorsement that the prisoner has a procuration, without any other circumstance of falsehood or misrepresentation, constitutes a forgery, was referred to the judges, but no opinion was given, the prisoner dying in prison. *Maddock's case*, 2 *Russell*, 458.

Proof of the false making—in the name of the party—fictitious name.] Making an instrument in a fictitious name, or the name of a non-existing person, is equally forgery, as making it in the name of an existing person. 2 *East, P. C.* 957, 2 *Russell*, 328. The prisoner was indicted under stat. 2 Geo. 2. c. 25, for uttering a forged deed, purporting to be a power of attorney from Elizabeth Tingle, administratrix of Richard Tingle, late a marine, empowering a person to receive prize money due to her. There was no such person as Elizabeth Tingle. The prisoner being convicted, a doubt was entertained, whether, as there was no such person in existence as the party in whose name the deed was executed, it amounted to forgery, and the case was referred to the judges, when eleven of them were of opinion, that the case was within the meaning and the letter of the act. *Lewis's case*, *Foster*, 116. In a case which occurred a few years after the preceding, where a prisoner had been convicted of indorsing a bill of exchange in a fictitious name, the judges, on a reference to them, held unanimously, that a bill of exchange, drawn in fictitious names, where there are no such persons existing as the bill imports, is a forged bill within

the stat. 2 Geo. 2. *Wilks's case*, 2 *East*, *P. C.* 957. The same point was decided by the judges in *Bolland's case*, 1 *Leach*, 83, 2 *East*, *P. C.* 958. And again where the prisoner had forged a check upon a banker in the name of a fictitious person, the judges observed, that it would be a very forced construction of the statute to say, that the forgery of a fictitious name, with intent to defraud, was not within it. *Lockett's case*, 1 *Leach*, 94, 2 *East*, *P. C.* 940.

It is not necessary, in order to render the act forgery, that the party should gain any additional credit by the fictitious name.

The prisoner was indicted for forging an indorsement of a bill of exchange in the name of *John Williams*. It appeared that the prisoner having paid away the bill, the holder applied to a banker to discount it, which he refused to do, unless the holder would put his name upon it. This the holder declined to do, but said, he would procure the person from whom he received it, to indorse it. He accordingly applied to the prisoner, who immediately indorsed it, "John Williams," which was a fictitious name, and the bill was discounted. On a case reserved, the judges were unanimously of opinion, that this was forgery within the statute; for although the fictitious name was not necessary for the prisoner's obtaining the money, and his object in it, probably, was only to conceal the hands through which the bill had passed, yet it was a fraud both upon the holder and discounter, as the one lost the chance of tracing the bill, and the other the benefit of a real indorser. *Taft's case*, 1 *Leach*, 172, 2 *East*, *P. C.* 959. So where the prisoner, having got possession of a bill indorsed in blank, gave a receipt for the amount in a fictitious name, being indicted for this forgery, it was objected, that he gained no additional credit by the name he assumed. Being convicted, the case was reserved for the opinion of the judges, who (with the exception of Buller J., who doubted,) unanimously held that the conviction was right. They said, that though the prisoner did not gain any additional credit by signing the name he put to the receipt, as the bill was not payable to the person whose name was used, but indorsed in blank, it was still a forgery, for it was done with intent to defraud the true owner of the bill, and to prevent the possibility of tracing the person by whom the money was received. *Taylor's case*, 2 *East*, *P. C.* 960, 1 *Leach*, 214.

In order to prove that the name "Samuel Knight, market-place, Birmingham," was fictitious, the prosecutor was called and stated, that he went twice to Birmingham to make inquiries, and inquired at a bank there, and at a place where the overseers usually met; and that he also had made inquiries at Nottingham, without success. The prosecutor was a stranger in both these towns. It was objected for the prisoner, that this

evidence was not sufficient; that in the case of a prosecution at the instance of King's College, in order to prove a certain name fictitious, the two-penny postman and police officer of the district were called. The judges at the Old Bailey (Park and Parke Js. and Bolland B.) were of opinion, that there was evidence, though not satisfactory, to go to the jury, not being the usual evidence given on such occasions, but that it was for the jury to say whether it was sufficient. The jury found the prisoner not guilty. *King's case*, 5 *C. & P.* 123.

Upon an indictment for uttering a forged check upon Jones, Loyd & Co. bankers, purporting to be drawn by G. Andrewes, it was held sufficient *primâ facie* evidence of the drawer's name being fictitious, to call a clerk of the bankers, who stated, that no person of that name kept an account with, or had any right to draw checks on their house. *Backler's case*, 5 *C. & P.* 119. *Brannan's case*, 6 *C. & P.* 326.

Proof of the false making—in the name of the party—fictitious name—assumed and borne by the party forging.] The circumstance that the party making the forged instrument has assumed, and been known by the fictitious name in which it is executed, for some time before the making, will not prevent its being a forgery; there being no distinction whether the credit was given to the *person* of the prisoner, or to the name assumed by him. On a prosecution for forging an order for the payment of money, it appeared that the prisoner had made the order in a fictitious name, and the prosecutor stated, that he looked upon it to be the prisoner's draft. The prisoner being convicted, a doubt arose upon the point, whether the prosecutor had given credit to the prisoner, or to the draft; but the judges held the conviction right, observing, that it was a false instrument, and not drawn by any such person as it purported to be. *Sheppard's case*, 2 *East, P. C.* 967, 1 *Leach*, 226.

The prisoner, Elizabeth Dunn, was indicted for forging a promissory note as the maker. The note was subscribed,

her
Mary ⋈ Wallace,
mark.

It was payable to the prosecutor, a prize agent, to whom the prisoner applied in the character of executrix of John Wallace, a deceased seaman. The prosecutor having advanced her the sum mentioned in the note, wrote the body of it, and desired her to sign it, asking what name he must write over her mark. She replied, *Mary Wallace*, and the prosecutor's clerk put his name as a witness. The prisoner being found guilty, a case was reserved, when nine of the judges held the conviction right. Mr. Justice Aston doubted, upon a principle not now maintainable, that to constitute forgery the instrument itself must be

false, and that the merely assuming a fictitious name to it, will not make it a forgery. *Dunn's case*, 1 *Leach*, 57, 2 *East, P. C.* 962.

The circumstances in the following case were somewhat different, and the judges were divided in opinion; though it is observed by Mr. East, (2 *P. C.* 968,) that it is difficult to distinguish it from the foregoing case. The prisoner, *John Henry Aickles*, was indicted for forging a promissory note, which purported to be made by John Mason. The note, which was dated 18th of December, 1786, was offered in payment by the payee, Byron, on the 9th of January, 1787. Byron being asked where the maker lived, replied at No. 4, Argyle-street. On a reference there it appeared that the prisoner had taken the house in the name of John Mason, and was known by that name. His name was in fact Aickles, by which he had been known up to 1780. Grose, J. told the jury that, if they believed that the name taken by the prisoner was in consequence of a concerted scheme between him and Byron, to defraud the prosecutor, they would be justified in finding him guilty; and he directed them to find whether the prisoner had ever gone by the name of John Mason before, and whether he had assumed it for the purpose of this fraud. The jury found that the prisoner intended to defraud the prosecutor, and that he assumed the name of Mason for the purposes of the fraud; that he had never gone by that name before, and that they disbelieved a witness, who stated that two years before he was inquired for, and known by that name at the British Coffee-house. The prisoner was found guilty by consent, subject to the opinion of the judges. Grose, J., and other judges, thought the case amounted to forgery. There was an apparent design to defraud in general, and the jury had found that the fictitious name was assumed with a design to defraud. Whether there was a person of that name was immaterial, the felony consisting in the intent to defraud. A person might assume a feigned name and make a draft in it, and yet innocently, as if he concealed himself to avoid arrest, and had appointed his friend, on whom he drew, to pay his bill, or giving notes, took care to pay them when due. But the prisoner, on the contrary, intended to defraud the party by the feigned name, by making the note under a disguise by which, after he left the place of concealment, he could not be traced. There was nothing to distinguish this from the common case of a note made in the name of a man who does not exist. The judges who thought it not a forgery, proceeded on the doubt whether, to constitute a forgery, it was not necessary that the instrument should be made as the act of another, according to the definition of Lord Coke, whether that other existed or not; whereas here the note was made as the prisoner's own, and avowed by him to be so; the credit was given to the person, and not to the

name, and the person and not the name was the material thing to be considered. Upon some favourable circumstances appearing in the case of the prisoner, he was acquitted, and the judges never came to any final resolution upon the case. *Aickles's case*, 2 *East*, *P. C.* 968, 1 *Leach*, 438. The opinion of the judges who held the conviction of the prisoner right, has been defended by several writers of great eminence. 2 *East*, *P. C.* 972. 6 *Evans*, *Coll. Stat.* 580. 2 *Russ.* 335. The point again arose, and was decided in the following case. The prisoner was indicted for forging a bill of exchange, dated 3d of April, 1812, in the name of Thomas White, as drawer. It appeared that the prisoner came to Newnham, on the 21st of March, 1813, where he introduced himself under the name of White, and where he resided, under that name, until the 22d of May, officiating as curate under that name. On the 17th of April he passed away the bill in question. Dallas, J. told the jury that if they thought the prisoner went to Newnham in the fictitious character of a clergyman, with a false name, for the sole purpose of getting possession of the curacy, and of the profits belonging to it, they should acquit him; but if they were satisfied that he went there, intending fraudulently to raise money by bills in a false name, and that the bill in question was made in prosecution of such an intent, they should convict him. The jury convicted him accordingly, and found that the prisoner had formed the scheme of raising money by false bills, before he went to Newnham, and that he went there, meaning to commit such fraud. The judges, on a case reserved, were of opinion, that where proof is given of a prisoner's real name, and no proof of any change of name until the time of the fraud committed, it throws it upon the prisoner to show, that he had before assumed the name on other occasions, and for different purposes. They were also of opinion, that where the prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, drawing, accepting, or indorsing in such assumed name, is forgery. *Peacock's case*, 1 *Russ. & Ry.* 278.

The prisoner, Samuel Whiley, was indicted for forging a bill of exchange, drawn in the name of *Samuel Milward*. On the 27th of December, 1804, the prisoner came to the shop of the prosecutor, at Bath, and ordered some goods, for which, a few days afterwards, he said he would give a draft upon his banker in London, and accordingly he gave the bill in question. No such person as Samuel Milward kept an account with the London banker. The prisoner had been baptized and married by the name of *Whiley*, had gone by that name in Bath in the July preceding this transaction, and at Bristol the following October, and at Bath again on the 4th of December. About the 20th of that month he had taken a house in Worcestershire, under the same name; but, on the 28th of December,

the day after his first application to the prosecutor, he ordered a brass plate to be engraved with the name of "Milward," which was fixed upon the door of his house on the following day. The prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; and if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods. In his defence, the prisoner stated that he had been christened by the name of *Samuel Milward*, and that he had omitted the name of *Whiley* for fear of arrests. The judge left it to the jury to say, whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the draft with intent to defraud the prosecutor. The jury found the prisoner guilty, and the judges, upon a reference to them, were of opinion, that the question of fraud being so left to the jury, and found by them, the conviction was right. *Whiley's case*, 2 *Russ.* 335, *Russ. & Ry.* 90.

The prisoner, John Francis, was indicted for forging an order for payment of money upon the bankers, Messrs. Praed and Co., in favour of Mrs. Ward. On the 15th of August, the prisoner had taken lodgings at Mrs. W.'s house, under the name of Cooke, and continued there till the 9th of September, when he gave her the order in question, for money lent him by her. The order, which was signed "James Cooke," being refused by the bankers, he said he had omitted the word "junior," which he added; but the draft was again refused, and the prisoner in the mean time left the house. The case was left by the judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of Cooke with a fraudulent purpose, and they found him guilty. On a case reserved, all the judges who were present held the conviction right, and were of opinion that, if the name was assumed for the purpose of fraud and avoiding detection, it was as much a forgery as if the name were that of any other person, though the case would be different if the party had habitually used and become known by another name than his own. *Francis's case*, *Russ. & Ry.* 209. 2 *Russ.* 336.

To bring the case within the rule laid down in the above decision, it must appear both that the name was assumed, and that it was assumed for the purposes of fraud in the particular transaction. The prisoner, Thomas Bontien, was charged with forging the acceptance of a bill of exchange. It appeared from the evidence of the prosecutrix, that having a house at Tottenham to let, in October, 1811, the prisoner took it, and, to pay for the furniture and fixtures, wrote the bill in question, which the prosecutrix signed as drawer, and the prisoner accepted in the name of Thomas Scott. The bill was dated

12th of November, 1810; the prisoner went at the time by the name of Thomas Scott: at various times he had gone by the name of Bontien; but he called a witness, who stated that he first knew the prisoner at the latter end of August, 1810, and knew him continually by the name of Scott; that he had a nick name of *Bont* or *Bontien* at times. He proved that he had transacted business with the prisoner in the name of Scott, in the year 1810; that he never knew him by any other name; and that his only knowledge of his having gone by other names was from the newspapers. The prisoner being convicted, a majority of the judges, upon a case reserved, (Mr. Justice Heath appearing of a contrary opinion) thought that it did not sufficiently appear, upon the evidence, that the prisoner had not gone by the name of Scott before the time of accepting the bill, or that he had assumed the name for that purpose, and they thought the conviction wrong. *Bontien's case, Russ. & Ry.* 260.

Proof of the false making—with regard to the apparent validity of the matter forged.] It is said to be in no way material whether a forged instrument be made in such a way as, were it true, it would be of validity, or not. *Hawk. P. C. b.* 1. c. 70. *s.* 7. But this, it is observed by Mr. East, must be understood where the false instrument carries on the face of it the semblance of that which is counterfeited, and is not illegal in its very frame. 2 *East, P. C.* 948. Thus, in *Crooke's case*, who was indicted upon the statute 5 Eliz. c. 14, where the conveyance described the estate intended to be affected by a wrong name, and was therefore ineffectual at law, if genuine, to pass the property intended, (though some of the judges thought that equity would have decreed a proper conveyance;) yet the forgery was held indictable, it not being necessary that there should be a charge, or possibility of charge, if done with intent to defraud. *Crooke's case*, 2 *Str.* 901, 2 *East, P. C.* 948. So where a man was indicted at common law for forging a surrender of the lands of J. S., and it did not appear in the indictment that J. S. had any lands; upon motion in arrest of judgment, it was held good, it not being necessary to show any actual prejudice. *Goate's case*, 1 *Lord Raym.* 737.

Upon the same principle it has been held in several cases, that the false making of a will is forgery, although the supposed testator be alive. Where the prisoner had been convicted of forging the will of J. G., a living person, on a case reserved, it was objected for the prisoner, that the instrument, being ambulatory, could not properly be described as the last will and testament of J. G., and that there could not be a forgery of a thing which did not and could not exist at the time of the forgery. But the judges held the conviction proper: they said that it was suffici-

ent if it purported on the face of it to be a will, and that the objection was only applicable to the effect which a will has in law, and not to the fact of making it; that the instrument existed in his lifetime, though not to take effect till his death, and if the act of making it were not a forgery at the time, the subsequent publication of it would not make it so. *Coogan's case*, 2 *East, P. C.* 948, 1 *Leach*, 449.

So the making of a false instrument is forgery, though it may be directed by statute that such instruments shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes. This question arose upon a prosecution for forging a power of attorney for the receipt of prize-money, which, by stat. 26 G. 3. c. 63, was required to have certain forms. The power had not, in one particular, followed the directions of the act. The prisoner being convicted, a case was reserved for the opinion of the judges, when all (except Graham B. and Bayley J.) were of opinion that the letter of attorney was not a void instrument, but that it might be the subject of a criminal prosecution; that a payment made under it, to the use of the petty officer, would be good as against him, and that the attorney under it might bring an action for the prize-money, or execute a release. Graham B. and Bayley J. thought that it was a void instrument, that no person, without a breach of duty, could make the payment of prize-money under it, and consequently that no person could be guilty of a capital crime by forging it. *Lyon's case*, *Russ. & Ry.* 255.

Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law. The prisoner was indicted for forging a bill of exchange. It was objected for him, that the bill was unstamped, and the 23 G. 3. c. 58. s. 11, was referred to, which enacts, that no bill of exchange shall be pleaded, or given in evidence, in *any* court, or admitted in *any* court to be good, or available at law or in equity, unless stamped. The prisoner was convicted, and the judges determined that the conviction was right; for the words of the act cited mean only, that the bill shall not be made use of to recover the debt; and, besides, the holder of a bill was authorised to get it stamped after it was made. *Hawkeswood's case*, 1 *Leach*, 257. Soon after this decision, the point arose again, and on the authority of *Hawkeswood's case* the prisoner was convicted and executed. *Lee's case*, *Id.* 258. (*n.*) The question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the mean time, the law, with regard to the procuring bills and notes to be subsequently stamped, upon which, in *Hawkeswood's case*, the judges appear in some degree to have re-

lied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted, the case was argued before the judges, and for the prisoner it was urged, that the stat. 31 G. 3. c. 25. s. 19, which prohibits the stamp from being afterwards affixed, distinguished the case from *Hawkeswood's*. Though two or three of the judges doubted at first the propriety of the latter case, if the matter were *res integra*, yet they all agreed, that being an authority in point, they must be governed by it; and they held that the stat. 31 G. 3. made no difference in the question. Most of them maintained the principle of *Hawkeswood's case* to be well founded, for the acts of parliament referred to were mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose. That it was not necessary, to constitute forgery, that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. *Morton's case*, 2 *East*, *P. C.* 955, 1 *Leach*, 258. (*n.*) The doctrine was again confirmed in *Teague's case*, 2 *East*, *P. C.* 979, when the judges said, that it had been decided that the stamp acts had no relation to the question of forgery, but that, supposing the instrument forged to be such, on the face of it, as would be valid, provided it had a proper stamp, the offence was complete.

Proof of the false making—with regard to the apparent validity of the matter forged—substantial resemblance to true instrument.] It is not essential that the forged instrument should in all respects bear an exact resemblance to the real instrument which it purports to be; it is sufficient if it bear a substantial resemblance. Where the forgery, says Mr. East, consists in counterfeiting any other known instrument, it is not necessary that the resemblance should be an exact one; if it be so like as to be calculated to deceive, when ordinary and usual observation is given, it seems sufficient. The same rule holds, in cases of counterfeiting the seals, and coining. 2 *East*, *P. C.* 858. Thus, where the prisoner was indicted for forging a bank-note, and a person from the Bank stated that he should not have been imposed upon by the counterfeit, the difference between it and the true note being to him so apparent, yet it appearing that others had been deceived, though the counterfeiting was ill executed, Le Blanc J. held that this was a forgery. *Hoost's case*, 2 *East*, *P. C.* 950. The prisoner was indicted for forging a Bank of England note. The instrument, though it much re-

sembled a real bank-note, was not made upon paper bearing the water-mark of the Bank; the number also was not filled up, and the word "pounds" was omitted after the word "fifty;" but in the margin were the figures 50*l.* It was contended that, on account of these defects, this could not be held a forgery of a bank-note; but the judges held the prisoner rightly convicted; for, first, in forgery, there need not be an exact resemblance; it is sufficient that the instrument is *primâ facie* fitted to pass for a true one; secondly, the majority inclined to think that the omission of "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury, whether the note purported to be for 50*l.*, or any other sum; but all agreed that the 50*l.* in the margin removed all doubt. *Elliott's case*, 2 *East, P. C.* 951. 1 *Leach*, 175, 2 *New Rep.* 93. (*n.*)

The same point has arisen in several cases upon indictments for forging bills of exchange. The prisoner was indicted for forging, and also for uttering a forged bill of exchange. He discounted the bill and indorsed a name upon it; but there was no indorsement of the name of the drawers, to whose order it was payable. It was urged for the prisoner, that as there was no indorsement by the payees, nor any thing purporting to be such an indorsement, the instrument could not pass as a bill of exchange, and could not, therefore, effect a fraud. The prisoner was convicted, and all the judges who were present, on the argument of a case reserved, held the conviction proper. Lawrence, J. at first doubted, but his doubts were removed by the argument that, had it been the true and genuine bill it purported to be, the holder for a valuable consideration from the payees, might have compelled the latter to indorse it. Mr. Justice Bayley was not present at the meeting, but thought the conviction wrong; he was of opinion that, for want of an indorsement, the bill was not negotiable, and therefore, if genuine, not of value to the holder of it. *Wicks's case*, *Russ & Ry.* 149.

A mistake in the Christian name of the party, in making the false signature to the instrument, will not prevent its being a forgery. The prisoner was indicted for forging the will of *Peter* Perry. The will began "I, Peter Perry," and was signed

his
John ✕ Perry.
mark.

It was objected that this was not a forgery of the will of Peter Perry, as laid in the indictment; but the prisoner was convicted, and afterwards executed. *Fitzgerald's case*, 2 *East, P. C.* 953.

So upon an indictment for vending counterfeit stamps, (contrary to 44 G. 3. c. 98.) it appeared that the stamp in

all respects resembled a genuine stamp, excepting only the centre part which specifies the duty, which in the forged stamp had been cut out, and the words "Jones, Bristol," on a paper, pasted in the place. The fabrication was likely to deceive the eye of a common observer. The judges on a case reserved held, that the prisoner was rightly convicted of forgery, observing, that an exact resemblance, or *fac simile*, was not necessary to constitute the crime of forgery; for, if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. *Collicott's case*, 2 *Leach*, 1048, 4 *Taunt.* 300, *Russ. & Ry.* 212.

Proof of the false making—with regard to the apparent validity of the matter forged—substantial resemblance to true instruments—cases of non-resemblance.] Though a similarity to a common intent be sufficient, yet it is necessary that the forged instrument should in all essential parts bear upon the face of it the similitude of a true one, so that it be not radically defective and illegal in the very frame of it. 2 *East, P. C.* 952. This principle is illustrated by many cases which have occurred upon indictments for forging bills of exchange and promissory notes. The prisoner was indicted for uttering a forged promissory note. It appeared that he had altered a note of the Bedford bank, from one to forty pounds, but had cut off the signature of the party who had signed it, so that the words "for Barnard, Barnard, and Green," only were left. The prisoner being convicted, the judges were clearly of opinion that the conviction was wrong. *Pateman's case, Russ. & Ry.* 455.

The prisoner was indicted for having in his custody a certain forged paper writing, purporting to be a bank note, in the following form:—

"I promise to pay J. W., Esq., or bearer, £10.
London, March 4, 1776.

For Self and Company of
£Ten. my Bank of England.
Entered. John Jones."

A special verdict was found, and the question argued before the court was, whether this paper writing purported to be a bank-note. The court were of opinion that the representation which the prisoner had made that it was a good note could not alter the purport of it, which is what appears on the face of the instrument itself; for, although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of felony. *Jones's case*, 1 *Leach*, 204, 2 *East, P. C.* 883. *See* 4 *Taunt.* 303.

The prisoner was indicted for putting off a forged promissory note. The instrument was as follows:—

No. 6414. Blackburn Bank. 30 Shillings.
I promise to take this as thirty shillings, on demand, in part for a two pound note, value received.
Entered. J. C. Blackburn, Sept. 18, 1821.
No. 6414.
Thirty Shillings. For Cunliffe, Brooks, and Co.
R. Cunliffe.

The prisoner was convicted; but it being doubted by the judge, whether the instrument had any validity, a case was reserved, and the judges held that the judgment ought to be arrested. It has been observed of this instrument, that it was not payable to the bearer on demand; that it was not payable in money; that the maker only promised to *take it* in payment; and that the requisitions of the statute 17 Geo. 3. c. 30. were not complied with. *Burke's case, Russ. & Ry.* 496. So where the prisoner was indicted for forging the acceptance of a bill of exchange for 3*l.* 3*s.*, and it appeared that the requisitions of the statutes 15 G. 3. c. 5. and 17 Geo. 3. c. 30. had not been complied with, the bill not specifying the place of abode of the payee, nor being attested by any subscribing witness, the prisoner having been convicted, the judges on a reference to them were unanimously of opinion that the instrument, if real, would not have been valid or negotiable, and that therefore the conviction was wrong. *Moffatt's case,* 1 *Leach,* 431, 2 *East, P. C.* 954. This case was distinguished, on the conference of the judges, from *Hawkeswood's case, ante, p.* 392, where the holder of the bill had a right to get it stamped (see *Morton's case, ante, p.* 393.); and the stamp act only says it shall not be used in evidence till stamped. 2 *East, P. C.* 954.

The prisoner was indicted for forging an order for the payment of money upon the treasurer of the navy. There was no payee named in the order; and upon this ground, and also upon the ground that the order was directed to the *treasurer,* and not to the *commissioners of the navy,* (the latter being the legal paymasters,) it was objected that the prisoner was wrongly convicted. Eleven of the judges having met, agreed that the direction to the treasurer instead of the commissioners, would not prevent its being considered an order for the payment of money; but the majority of them (Mansfield, C. J., *diss.*) held that it was not an order for the payment of money, because of the want of a payee, and that the conviction was wrong. *Richards's case, Russ. & Ry.* 193. In a case which occurred soon after the preceding, the judges ruled the same way, with regard to a bill of exchange, in which the name of the payee was left blank. *Randall's case, Russ. & Ry.* 195.

Upon the same ground, *viz.* that the instrument, if genuine, would have been of no validity, the following case was decided. The prisoner was convicted of forging a will of land, of one T. S., deceased, attested by *two* witnesses only. It did not appear in evidence what estate the supposed testator had in the land demised, or of what nature it was; and it was urged that it must be presumed to have been freehold, and that the will therefore was void by the statute of frauds, for want of attestation by three witnesses. The judges, on a conference, held the conviction wrong; for, as it was not shown to be a chattel interest, it was to be presumed to be freehold. *Wall's case*, 2 *East, P. C.* 953.

Proof of the act of forgery.] It is seldom that direct evidence can be given of the act of forgery. In the case of negotiable securities, the evidence is usually applied to the uttering rather than to the forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in the case of a bond or will, after proof that it has been forged by some one, a strong presumption necessarily arises against the party in whose favour the forgery is made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the forged instrument is in the hand-writing of the prisoner, must, if unexplained, be necessarily strong evidence of his guilt. 2 *Stark. Ev.* 331, 2*d ed.*

In the description of the act of forging, it will not in general be a material variance, if words are added, which are not in the statute. Thus, an indictment on the statute 2 Geo. 2. c. 25, which charged the defendant with feloniously altering, and causing to be altered, a certain bill of exchange, by falsely making, forging, and adding a cypher 0 to the letter and figure £8, &c. was held good through the words of the statute, are, "if any person shall make, forge, or counterfeit," and the word *alter* is not used. *Elsworth's case*, 2 *East, P. C.* 986, 988. So where an indictment, since the passing of the statute 11 G. 4. & 1 W. 4. c. 66, which uses only the word *forge*, stated that the prisoner "forged and *counterfeited*" a certain instrument, it was held not to be bad, and that the word "counterfeit" might be rejected. *Brewer's case*, 6 *C. & P.* 363.

Proof of the uttering.] The various statutes relating to the offence of uttering forged instruments, employ various words to designate the act. In the statute 1 W. 4. c. 66, the terms used to describe the offence, are "offer, utter, dispose of, or put off." The word offer was probably inserted to meet the case of an incomplete uttering, or putting off, as in *Wooldridge's case*, 1 *Leach*, 307, 1 *East, P. C.* 179.

The averment of uttering will in general be proved by the

same description of evidence as is necessary to maintain an indictment for uttering counterfeit coin, the cases respecting which have been already detailed, *ante*, *p.* 301.

Proof of uttering a forged *acceptance* will not support an indictment charging the prisoner with uttering a forged *bill*. *Horvell's case*, 6 *C. & P.* 148.

The addition of words not used by the statute 1 W. 4. c. 66, in describing the offence of uttering, as where the indictment stated that the prisoner uttered and "published as true," &c., will not vitiate the indictment. *Brewer's case*, 6 *C. & P.* 363.

Where the prisoner presented a bill for payment, with a forged indorsement upon it, of a receipt by the payee, and on the person to whom it was presented objecting to a variance between the spelling of the payee's name in the bill and in the indorsement, altered the indorsement into a receipt *by himself* for the drawer, it was ruled that the presenting of the bill before the objection, was a sufficient uttering of the forged indorsement. *Arscott's case*, 6 *C. & P.* 408.

As to uttering by several. *Vide*, *ante*, *p.* 301.

Proof of the disposing or putting off.] Upon the words of the repealed statute of 15 G. 2. c. 13. s. 11, which were, "dispose of or put away," the following case was decided. The prisoners were indicted for disposing and putting away forged Bank of England notes. It appeared that the prisoner, Palmer, had been in the habit of putting off forged Bank notes, and had employed the other prisoner, Hudson, in putting them off. The latter having offered a forged note in payment, in the evening of the same day, Palmer went with her to the person who had stopped it, and said, "This woman has been here to-day, and offered a two-pound note, which you have stopped, and I must either have the note or the change." It was contended for the prisoners, that the evidence was of two distinct and separate offences, and not of a joint offence. The jury having found Palmer guilty of the offence of disposing and putting away the note, a case was reserved for the opinion of the judges, which was delivered by Mr. Justice Grose. He said that a difference of opinion had existed among the judges, some holding that until Hudson uttered the note, it was to be considered as virtually in Palmer's possession, and that when she did utter it, he was to be considered only as an accessory before the fact, and ought to have been so indicted. But a great majority of the judges were of opinion that the conviction was right. It clearly appeared that Palmer knowingly delivered the forged note into the hands of Hudson, for the fraudulent purpose of uttering it for his own use. He could not have recovered it back by any action at law. It was out of his legal power, and when it was actually uttered by her, the note

was *disposed of*, and *put away* by him through her means. As delivering an instrument to another, was a step towards uttering it, it seemed most consonant to the intentions of the legislature to hold that the delivery to another for a fraudulent purpose, was an offence within the words "dispose of," or "put away." *Palmer's case*, 2 *Leach*, 978, 1 *Bos. & P. N. R.* 96, *Russ. & Ry.* 72.

The same point arose, and was decided the same way in *Giles's case*. The jury in that case found that the prisoner had given the note to one Burr, and that he was ignorant of its being forged, and paid it away. The judges to whom the case was referred, thought that Burr knew it was forged; but were of opinion that the giving the note to him that he might pass it, was a *disposing* of it to him, and that the conviction was right. 1 *Moody, C. C.* 166. Had the prisoner been charged with *uttering* instead of *disposing of* the note, it seems that, according to the view of the case taken by the judges, Burr being cognizant of the forgery, the prisoner could not have been convicted on that indictment, as in that case his offence would have been that of accessory before the fact. *See Soares's case*, *Russ. & Ry.* 25, 2 *East, P. C.* 974, *Davis's case*, *Russ. & Ry.* 113, *ante*, *p.* 301.

It seems that the mere showing of a false instrument with intent thereby to gain credit, is not an offence within the statutes against forgery. The prisoner was indicted (under the 13 G. 3. c. 79,) for uttering and publishing a promissory note containing the words, &c. It appeared, that in order to persuade an inn-keeper that he was a man of substance, he one day after dinner pulled out a pocket-book, and showed him the note in question, and a 50*l.* note of the same kind. He said he did not like to carry so much property about him, and begged the inn-keeper to take charge of them, which he did. On opening the pocket-book some time afterwards, the notes were found to be forged. The prisoner being convicted, the judges held that this did not amount to an uttering. In order to make it such, they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it. *Shukard's case*, *Russ. & Ry.* 200.

The prisoner was indicted in London under the 44 G. 3. c. 98, for uttering forged medicine stamps. Having an order to supply medicines to certain persons at Bath, he delivered them at his house in Middlesex to a porter, to carry them to Aldersgate-street, in London, to the Bath waggon. It was objected that this was not an *uttering* by the prisoner in the city of London, and upon the argument of the case before the judges, there was a difference of opinion upon the subject, although the majority held the offence complete in London. *Collicott's case*, 2 *Leach*, 1048, *Russ. & Ry.* 212, 4 *Taunt.* 300, *S. C.*

It is not essential that the indictment should state the persons to whom the forged instrument is uttered, where the statute upon which the indictment is grounded, makes the uttering generally (without specifying to *whom*) an offence; and if the uttering be to a person employed to detect the offender, and who is not therefore deceived, the offence is complete. Both these points arose in *Holden's case*. Upon the first, the judges said the statute makes it felony to *put away* or *dispose of* generally, without saying "to any person" or "to any of the king's subjects," and this form has been used in indictments for putting off, as well as in indictments for uttering, for a long course of years. As to the second objection, the offence was the same, though the party for the purpose of detection caused the application to be made to the prisoners to sell the notes, if the prisoners put them off with the intent to defraud; the *intent* is the essence of the crime, which exists in the mind, though from circumstances which he is not apprised of, the prosecutor cannot be defrauded by the act of the prisoner. *Holden's case, Russ. & Ry.* 154, 2 *Leach*, 1019, 2 *Taunt.* 334.

Proof of the intent to defraud.] An intent to defraud is an essential ingredient to constitute the offence of forgery. The definition of the crime by Grose J., on delivering the opinion of the judges, is "the false making of a note or other instrument *with intent to defraud.*" *Parke's & Brown's case*, 2 *Leach*, 775, 2 *East*, P. C. 853. So it was defined by Eyre B., "the false making of an instrument, which purports on the face of it to be good and valid, for the purposes for which it was created *with a design* to defraud." *Jones's case*, 1 *Leach*, 367, 2 *East*, P. C. 853. The word *deceive* has been used by Buller J., instead of the word *defraud*; but it has been observed, that the meaning of this word must doubtless be included in that of the word defraud. 2 *East*, P. C. 853.

Proof of the intent to defraud—mode of proof.] The intent to defraud must be stated in the indictment, and the proof must tally with the averment, otherwise the prisoner will be entitled to an acquittal. 2 *East*, P. C. 988. The intent is mostly evidenced by the act itself, which, from its nature, leaves in general no room for doubt upon the point. The inference is frequently confirmed by the conduct and behaviour of the guilty party in the artifices and falsehoods which he employs for the purpose of effecting his object, or of avoiding detection. The subsequent uttering or publication of the forged instrument is admissible, and strong evidence to prove the original design of forging the instrument, and whether the making or uttering of a forged instrument be done with an intent to injure a particular person as alleged, is matter of evidence for a jury. 2 *Stark. Ev.* 336, 2*d ed. Barron's case*, 2 *East*, P. C. 989.

Proof of the intent to defraud—with regard to the party intended to be defrauded.] The averment of the intent to defraud must be pointed at the particular person or persons against whom it is meditated, and the proof must agree with such averment. 2 *East, P. C.* 988. It is sufficient to aver a general intent to defraud a certain person. *Powell's case,* 1 *Leach,* 77. In order to find the intent to defraud a particular person, it is not necessary that there should be evidence to show that the prisoner had that particular person in contemplation at the time of the forgery, it is sufficient if the forgery would have the effect of defrauding him, for the prisoner, in presumption of law, intends that which is the natural consequence of his acts. The prisoner was indicted for disposing of a forged Bank-note, with intent to defraud the governor and company of the Bank of England. Bayley J., desired the jury to say what their opinion was with regard to the prisoner's intention to defraud the Bank. They stated that they thought the prisoner had the intention to defraud whoever might take the note; but that the intention of defrauding the Bank in particular, did not enter into his contemplation. The prisoner was found guilty, but a case was reserved for the opinion of the judges, who unanimously held that the prisoner, upon the evidence, must be taken to have intended to defraud the Bank, and consequently that the conviction was right. *Mazagora's case, Russ. & Ry.* 291. So where the prosecutor swore that he did not believe that the prisoner had forged the instrument with intent to defraud him, (as charged) yet the prisoner being convicted, the judges were of opinion that the conviction was right, the immediate effect of the act being the defrauding of the prosecutor. *Sheppard's case, Russ. & Ry.* 169.

Where the intent is laid to be to defraud a corporation, it must be proved that it was to defraud them in their corporate capacity; if it is stated as an intent to defraud them in their individual capacities, and it should appear in evidence that it was to defraud them in their corporate capacity, the variance would, as it seems, be fatal. 2 *Stark. Ev.* 337, 2*d ed. Jones & Palmer's case,* 1 *Leach,* 366, 2 *East, P. C.* 991. Where the prisoner was indicted for forging a deed, with intent to defraud A. B. C. D. &c., the stewards of the Feasts of the Sons of the Clergy, and it appeared that the individuals' named were the trustees (not incorporated) of a charitable institution, and it was objected that property of this description was not intended to be protected by the statutes against forgery, the court overruled the objection. They said that the stewards were the absolute owners of the money; it was their property; it was put into their hands upon trust; and as between them and the subscribers, if they were to convert the money to their own use, they would be personally liable. That there was no difference between

this case and that of a corporation, excepting that the money is the property of the whole corporation, and must be so alleged, but where the parties are not incorporated, it is the property of the several individuals. *Jones & Palmer's case*, 1 *Leach*, 366, 2 *East, P. C.* 991. See also *Sherrington's case*, 1 *Leach*, 513, *Beacall's case*, 1 *Moody, C. C.* 15, *post, title "Larceny."*

Where the act consists in the alteration of an instrument made by or to the party himself, it will not constitute forgery, unless it should appear that some third person may be defrauded. Therefore, where a person razed the word *libris* out of a bond made to himself, and inserted the word *marcis*, he was adjudged not to be guilty of forgery, because there was no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, yet it is said, that it would be forgery, if by the circumstances of the case it should any way appear to have been done with a view of gaining an advantage to the party himself, or of prejudicing a third person. *Hawk. P. C. b.* 1. *c.* 70. *s.* 4, 2 *East, P. C.* 854.

Where legal process was forged, and under it, debt and costs actually due were paid, upon an indictment for forging the document, with intent to defraud the party who had paid the debt and costs, Patteson J. ruled that there was no evidence of an intent to defraud that person, since he would have had the same sum to pay, if the process had been sued out in the regular manner. *Collier's case*, 5 *C. & P.* 160.

It is immaterial whether the party whose name is stated as the person intended to be defrauded has been actually prejudiced or not, it is sufficient if he might have been prejudiced. 2 *East, P. C.* 852. *Ward's case*, 2 *Str.* 747, 2 *Lord Raym.* 1461.

By the statute 11 Geo. 4. & 1 Wm. 4. c. 66. s. 28, it is enacted, that where the committing of any offence, with intent to defraud any person whatsoever, is made punishable by that act, in every such case, the word "person" shall throughout the act be deemed to include his majesty, or any foreign prince or state, or any body corporate, or any company, or society of persons not incorporated, or any person, or number of persons whatsoever, who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons, shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of his majesty or not, and that it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another, or others, as the case may be.

Proof of the identity of the party whose name is forged.] It is essential to prove the falsity of the instrument, either

by showing that the writing is not that of the person by whom it purports to have been made, or by showing that no such person exists; 2 *Stark. Ev.* 334, 2*d ed.*; or where the instrument is in the name of the party himself, by showing that he put it off fraudulently, as being the act of another person. Where the name forged is that of an existing person, it is necessary to disprove the making of the instrument in question by him.

It was supposed at one time, that the best evidence of the party not having made the instrument, was the party himself, and Gould and Yates Js. in one case directed an acquittal on that ground. *Smith's case*, 1 *Leach*, 333. (*n.*)

In the following case, in order to identify the person whose name was forged as the indorser of a bill, it was thought necessary to call the drawer, for the purpose of showing that the individual in question was the party really connected with the bill. The bill had been sent to Pearce, the payee and indorser, an intimate friend of Davis, the drawer; but it never came to his hands, and it was proved to have been uttered by the prisoner, with the indorsement, "William Pearce," upon it; Davis was not called, and the testimony of Pearce was rejected by Adair S. recorder; for although it might not be *his* hand-writing, yet it might be the hand-writing of a *William Pearce*, or as he had not been proved to be the person intended as the payee of the bill, it might be the hand-writing of the William Pearce, to whom the bill was made payable. The prisoner was accordingly acquitted. *Sponsonby's case*, 1 *Leach*, 332, 2 *East, P. C.* 996. It has been observed upon this case, that it may be doubted whether the fact of this William Pearce being an intimate acquaintance and correspondent of the drawer, and no evidence being given of the existence of any other William Pearce, to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee. 2 *East, P. C.* 997. The decision in *Sponsonby's case* may be considered as much shaken by the following authority. The prisoner was indicted for forging a promissory note, purporting to be made by one William Holland, payable to the prisoner, or order. It appeared that the prisoner had offered the note in payment to the prosecutor, who at first refused to take it, upon which the prisoner said, he need not be afraid, for it was drawn by William Holland, who kept the *Bull's Head*, at Tipton. William Holland was called, and proved that it was not his handwriting. He stated that there was no other publican of his name at Tipton, but there was a gentleman of the name of *William Holland*, living there on his means, who, for distinction, was called *Gentleman Holland*. The latter William Holland not being called, it was contended for the prisoner that there was not sufficient evidence of the note having been forged.

The prisoner being convicted, on a case reserved, the judges held, that as the prisoner had stated, that William Holland of the *Bull's Head* was the maker, (and from being payee of the note he must have known the particulars,) it was sufficient for the prosecutor to show that it was not the note of that William Holland, and that it lay upon the prisoner to prove, if the case were so, that it was the genuine note of another William Holland. *Hampton's case*, 1 *Moody, C. C.* 255.

The identity of the party whose name is forged, may also be established by the admission of the prisoner himself, as in the following case. The prisoner was charged with forging and uttering a bill of exchange in the name of Andrew Helme, with intent to defraud one Anthony, and also with forging an indorsement in the name of John Sowerby, on a bill purporting to be drawn by the said A. Helme, with the like intent. Some letters written by the prisoner, after his apprehension, to A. Helme, who was the prisoner's uncle, were produced, from which it clearly appeared, that the name of A. Helme was forged. In the same manner the forgery of Sowerby's name appeared, and that he was the son of a person of the same name at Liverpool. A witness proved that the prisoner offered him the bill in question with the indorsement upon it, informing him that A. Helme was a gentleman of credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses. Sowerby, the father, was then called, who swore that the indorsement was not his hand-writing; that he knew of no other person of the same name at Liverpool; that his son had been a cheesemonger there, but had left that town four months before, and was gone to Jamaica, and that the indorsement was not in his hand-writing. It was objected, that Helme, the drawer, was not called to prove what Sowerby, the payee, was; but the prisoner was convicted. The judges on a case reserved held the conviction right. They said, the objection supposed that there was a genuine drawer, who ought to have been called, but to this there were two answers, 1st, that the drawer's name was forged, which the prisoner himself had acknowledged; and 2dly, that the prisoner himself had ascertained who was intended by the John Sowerby, whose indorsement was forged, for he represented him as a cheesemonger at Liverpool, and that he meant young Sowerby, appeared from his mentioning his mother; and it appearing not to be young Sowerby's hand-writing, the proof of the forgery was complete. *Downes's case*, 2 *East, P. C.* 997.

In the following case also, the falsity of the instrument was proved by the admission of the prisoner. Beatty and others were indicted for a conspiracy to defraud by means of a fraudulent acceptance of a bill of exchange. The indictment averred that Beatty fraudulently wrote the acceptance. The only evi-

dence to support this averment was that of a witness who proved that the bill, with the acceptance upon it, was shown to Beatty, who being asked whether it was a good one, answered, *very good*. The prisoners being convicted, the judges, on a case reserved, were of opinion that the confession was properly left to the jury, as evidence from which they might find the fact of his having written the acceptance, and that the conviction was right. *Hevey's case*, 1 *Leach*, 232, 2 *Leach, P. C.* 856. (*n.*)

But where it appears that there are persons in existence residing at the place which the forged instrument refers to, the proof must be given that those persons are not in fact the real persons referred to, although in some respects they may be misdescribed. The prisoner was charged with both forging and uttering a forged acceptance. The bill was addressed thus:

To Messrs. Williams & Co.
Bankers, Birchin Lane,
3, London.

It was uncertain on the evidence when the figure 3 was written. The prisoner, when he paid away the bill, was asked whether the acceptors were Williams, Birch & Co., and his answers imported that they were. Williams, Birch & Co. lived at No. 20, Birchin Lane, and the acceptance was proved not to be theirs. Theirs was the only firm of Williams & Co., Bankers, in London. At No. 3, Birchin Lane, the name of Williams & Co. was on the door, and some bills addressed to Messrs. Williams & Co. Bankers, Swansea, had been accepted, payable at No. 3, and paid there. There was no evidence as to who lived at No. 3, but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there. The prisoner was convicted, but the judges, on a case reserved, were of opinion that the facts proved against the prisoner did not amount to forgery. *Watt's case, Russ. & Ry.* 436, 3 *Brod. & Bingh.* 197.

Proof of the forged instrument.] The nature of the forged instrument must be stated in the indictment; *Wilcox's case, Russ. & Ry.* 50, *ante, p.* 382; and the proof must correspond with such statement. Formerly it was necessary that the instrument should have been set forth in words and figures, and any deviation in proof was a fatal variance. *Powell's case*, 2 *East, P. C.* 976. But a mere literal variance does not vitiate, as "value receivd," for "*value received*." The judges, on a case reserved, said, that according to *R. v. Bear, Carth.* 408, where an instrument is laid in the indictment with *the tenor*, the very *words* laid, and not the substance and effect of them must be proved. The question then was as to the *word*, and not as to the *letter*, unless by *addition*, *omission*, or *alteration*, it becomes another word, and they re-

ferred to *Holt*, 350, where Powys J. says, that the variance of a letter happening in spelling or abbreviation, possibly might not hurt. *Hart's case*, 2 *East*, *P. C.* 977. But where the forged instrument is set forth according to its *tenor*, great accuracy is required in the statement. "The tenor" has the same signification as the words, "in the words and figures following," or as "as follows." *Powell's case*, 2 *East*, *P. C.* 976, 1 *Leach*, 77. Therefore, in setting out an instrument which contains figures, the figures should be stated in the indictment, *Id.* See 2 & 3 W. 4. c. 123, *post*, *p.* 407.

The forged instrument may also be described by its *purport*, as a paper writing *purporting* to be the particular instrument in question, and it has been observed, that in strictness of language there may be more propriety in so laying it, since the purpose of the indictment is to disaffirm the reality of the instrument. 2 *East*, *P. C.* 980. In all cases the word *purport* imports what appears *on the face* of the instrument, *Id.* Where in one count the instrument was described as purporting to be a bank-note, the court being of opinion that it did not on the face of it purport to be such, held that the count could not be supported, and that the representation of the prisoner at the time he passed it off as such, could not vary the purport of the instrument itself. *Jones's case*, 2 *East*, *P. C.* 883, 981. Where the indictment charged, that the prisoner having in possession a bill of exchange, purporting to be signed by one J. W., and to be directed to one John King, by the name and description of John *Ring*, Berkeley St., &c., forged an acceptance purporting to be the acceptance of the said John King, the indictment was held bad on the ground, that it was impossible that the word *Ring* should purport to be the word *King*. *Reading's case*, 2 *Leach*, 590, 2 *East*, *P. C.* 981. And an indictment "for forging a check upon Messrs. Ransom, Moreland & Hammersley," stating it as purporting to be drawn on "George Lord Kinnaird, Wm. Moreland, & Thos. Hammersley, by the name and description of Messrs. Ransom, Moreland & Hammersley," was held bad on the same ground. *Gilchrist's case*, 2 *Leach*, 657, 2 *East*, *P. C.* 982. In the following case also, the variance was held fatal. The indictment charged the prisoner with forging a paper writing, *purporting* to be an inland bill of exchange, and to be directed to Richard Down, Henry Thornton, John Freer, and John Cornwall the younger, Bankers, London, by the name and description of Messrs. Down, Thornton & Co., Bankers, London, requiring them, &c., and then setting forth the tenor, from which it appeared that the direction was "Messrs. Down, Thornton & Co., Bankers, London," and this was held bad. *Edsall's case*, 2 *Leach*, 662. (*n.*) 2 *East*, *P. C.* 984. Where a receipt was signed "C. Ollier," and the indictment stated it as purporting to be signed by *Christopher* Oliver, the court (consisting of

Heath and Lawrence Js. and Thompson B.) were inclined to think that this differed from the foregoing case, as there was no absolute repugnance in the statement, and they reserved the case for the judges, but no opinion was ever given. *Reeves's case*, 2 *Leach*, 808, 814, 2 *East*, *P. C.* 984. (*n.*)

Where a fictitious signature is stated, it must be described as *purporting* to be the signature of the real party, for if it be described as his signature, and should appear in fact to be a forgery, the variance will be fatal. Thus, where the instrument was described as "a certain bill of exchange, requiring certain persons by the name and description of Messrs. Down, &c., to pay to the order of R. Thomson, the sum, &c., and signed by *Henry Hutchinson*, for T. G. T. and H. Hutchinson, &c., which bill is as follows, &c.", and it appeared in evidence that the signature to the bill, "Henry Hutchinson," was a forgery, it was objected that the indictment averring it to have been *signed* by him, (and not merely that it *purported* to be signed by him,) which was a substantial allegation, was disproved, and so the judges held, on a reference to them after conviction. *Carter's case*, 2 *East*, *P. C.* 985.

Where the particular nature of the instrument is misdescribed, the variance is of course fatal. The indictment charged the prisoner with forging "a promissory note for payment of money, which is as follows." The instrument appears to be in the following form.

"Two months after date, pay to Mr. B. H. or order, the sum of £28. 15*s.* value received.
At Messrs. Spooner & Co. JOHN JONES.
Bankers, London."

The prisoner being convicted, the judges, on a case reserved held, that this instrument was a bill of exchange, and not a promissory note, and that the conviction was wrong. *Hunter's case*, *Russ. & Ry.* 511.

A bank post bill must not be described as a *bill of exchange*, but it is sufficiently described by the designation of a *bank* bill of exchange. *Birkett's case*, *Russ. & Ry.* 251.

But now by 2 & 3 W. 4. c. 123. s. 3, it is enacted, that in all informations or indictments for forging, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or *fac simile* thereof, but it shall be sufficient to describe the same, in such manner as would sustain an indictment for stealing the same, any law or custom to the contrary notwithstanding.

Where the prisoner was indicted for uttering a forged banker's promissory note, which had been altered by changing the word *one* into *ten*, and it appeared in the indictment that the word *pound* had not been altered into *pounds*, it was objected that the

prisoner could not be convicted, as that which he had done was not altering or adding to, or forging a promissory note for money, it being, when altered, not a promissory note to pay ten pounds, but ten pound, in the singular number, which was ungrammatical, uncertain, and nonsensical. The judges, however, held the conviction right. *Pots's case, Russ. & Ry.* 101.

It will be no variance if it appear, that the instrument which is described in the indictment as a forged instrument, was originally a genuine one, but that it has been fraudulently *altered* by the prisoner; for every alteration of a true instrument for a fraudulent purpose, makes it, when altered, a forgery of the whole instrument. *Teague's case,* 2 *East, P. C.* 979. Thus, where the prisoner altered a figure of 2 in a bank note into 5, the judges agreed that this was forging and counterfeiting a bank note, forgery being the alteration of a deed or writing in a material part, to the prejudice of another, as well as when the whole deed or writing is forged. *Dawson's case,* 2 *East, P. C.* 978. In practice, however, forgeries of this kind are stated, in one count, at least, as alterations. 2 *East, P. C.* 986. 2 *Russell,* 370.

Proof with regard to principals and accessories.] Although, in general, it is necessary, in order to render a party guilty as principal in an offence, that he should have been present at the commission of the complete act, yet it is otherwise in forgery, where a person may incur the guilt of a principal offender by bearing a part only in the committing of the act, and in the absence of the other parties. Thus, where the prisoner impressed the water-marks, the date, line, and number, on forged bank-notes, and the other requisites were added at different times, and by different parties, not in the presence of the prisoner; on conviction, the judges were of opinion that the conviction was right; that as each of the offenders acted in completing some part of the forgery, and in pursuance of the common plan, each was a principal in the forgery, and that, though the prisoner was not present when the note was completed by the signature, he was equally guilty with the others. *Bingley's case, Russ. & Ry.* 446. Nor does it make any distinction in the case, that the prisoner was ignorant of those who were to effect the other parts of the forgery; it is sufficient that he knows that it is to be effected by some body. *Kirkwood's case,* 1 *Moody, C. C.* 304. *Dade's case, Id.* 307.

But with regard to the offence of *uttering* forged instruments, it is necessary, in order to render a party guilty as principal, that he should have been present. *Soares's case,* 2 *East, P. C.* 974, *ante, p.* 301. Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged order and certificate for the payment of prize-money, it

was held by the judges, that the presumption of coercion on the part of the husband did not arise; that she might be indicted as principal, and her husband as accessory before the fact. *Morris's case, Russ. & Ry.* 270, 2 *Leach*, 1096.

So an assent afterwards does not render the party guilty as a principal. 1 *Hale, P. C.* 684, 2 *East, P. C.* 973.

But in forgery, at common law, which is a misdemeanor, as in other cases of misdemeanor, those who, in felony, would be accessories, are principals. 2 *East, P. C.* 973.

By the 1 W. 4. c. 66. s. 25, it is enacted, that in the case of every felony punishable under that act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under that act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

Proof of guilty knowledge.] Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, evidence of that guilty knowledge must be given on the part of the prosecution; and for that purpose the uttering or having possession of similar forgeries will be admissible. The cases upon this subject have been already stated. *Ante, p.* 66 *to* 71. In an indictment against several, it is sufficient to state, that the prisoners *well knowing*, &c., without adding, "and each of them." *Birch's case*, 1 *Leach*, 79, 2 *East, P. C.* 980.

Witnesses.] Great inconvenience and much injustice were formerly occasioned by the rule of law which prevailed upon the subject of the admissibility of witnesses in cases of forgery, by which the party by whom the instrument purported to be made, was not admitted to prove the forgery, if, in case it had been genuine, he would either have been liable to be sued upon it, or to be deprived by it of a legal claim upon another. By some persons this rule was considered as an anomaly in the law of evidence; *Boston's case*, 4 *East*, 582, 2 *Russell*, 374; but the principle of it has been defended with much ingenuity by Mr. East, 2 *East, P. C.* 993. All difficulties on the subject are, however, now removed by the statute 9 G. 4. c. 32. (*ante, p.* 106.) The mode in which the evidence of interested witnesses was formerly rendered admissible, has been already noticed, *ante, p.* 112.

Venue.] It was formerly necessary to lay the venue in the county where the forgery was committed; and as it was frequently difficult to procure direct proof of the act of forgery, much inconvenience was occasioned. *See* 2 *Russell*, 371. But

now, by statute 1 W. 4. c. 66. s. 24, it is enacted, that if any person shall commit any offence against that act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.

Venue.—Forgery of documents not made or purporting to be not made in England.] The offence of uttering in England documents forged abroad, is provided against by the 30th section of the 1 W. 4. c. 66, by which it is declared and enacted, that where the forging or altering any writing or matter whatever, or the offering, uttering, disposing of, or putting off, any writing or matter whatsoever, knowing the same to be forged or altered, is in that act expressed to be an offence, if any person shall, in that part of the United Kingdom called England, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England, whether under the dominion of his majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of that act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England; and if any person shall in England forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with

some other purpose,) in whatever place or country out of England, whether under the dominion of his majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England.

Interpretation of the statute 1 *W.* 4. *c.* 66.] The statute 1 W. 4. c. 66, contains the following clause (sec. 28.) with regard to the interpretation of various words used in the act. And be it declared and enacted, that where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his majesty or any foreign prince, or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever, who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons, shall reside or carry on business in England or elsewhere in any place or country whether under the dominion of his majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named and another, or others, as the case may be.

Punishment.] By statute 2 & 3 W. 4. c. 123. s. 1. (reciting 1 W. 4. c. 66,) it is provided, that where any person shall, after the passing of that act, be convicted of any offence whatsoever, for which the said act enjoins or authorises the infliction of the punishment of death, or where any person shall, after the passing of that act, be convicted in Scotland or Ireland of any offence

now punishable with death, which offence shall consist wholly or in part of forging or altering any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then, and in each of the cases aforesaid, the person so convicted of any such offence as aforesaid, or of procuring, or aiding, or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of such offender's life.

By sect. 2, it is enacted, that notwithstanding any thing herein-before contained, this act shall not be construed to affect or alter the said recited act, or any other act or law now in force, so far as the same may authorise the punishment of death, to be inflicted upon any persons convicted, either in England, Scotland, or Ireland, of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate, or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority, to transfer any share or interest of, or in any stock, annuity, or other public fund, which now is, or hereafter may be transferable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate, or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment for each and every of the said offences, and for procuring, aiding, or assisting in the commission thereof, shall continue to be the same, as if this act had not been passed.

FORGING OF PARTICULAR INSTRUMENTS.

FORGING WILLS.

By the 3d section of the 1 W. 4. c. 66, the forging or uttering, &c., of "any will, testament, codicil, or testamentary writing," is rendered a capital punishment, and remains so by the express saving of the statute 2 & 3 W. 4. c. 123, *supra*.

It is no less a forging of a will, that the party whose name is forged is living. *Coogan's case*, 1 *Leach*, 449, 2 *East*, *P. C.* 948. If it appear that the will is a will of land, and attested by two witnesses only, there can be no forgery, *Wall's case*, *Id.* 953, *ante*, *p.* 397. Where the prisoners were indicted for

forging the will of *Peter* Perry, and it appeared that the will began, "I, *Peter* Perry," and ended

his
John ⋈ Perry,
mark.

It was objected that this was not the will of *Peter* Perry; but the prisoners being convicted, the judges held the conviction right. *Fitzgerald's case*, 2 *East*, *P. C.* 953. A probate unrevoked, is not conclusive proof of the validity of the will, and its repeal need not be proved. *Buttery's case*, *Russ. & Ry.* 342.

FORGING DEEDS.

The forging of "any deed, bond, or writing obligatory, or any court roll, or copy of court roll," is made subject to transportation for life, by the 10th section of the 1 W. 4. c. 66.

The forging a power of attorney to receive a seaman's wages, was held to be the forgery of a deed within the repealed statute 2 G. 2. c. 25. *Lewis's case*, 2 *East*, *P. C.* 957. So a power of attorney for the purpose of receiving prize-money. *Lyon's case*, *Russ. & Ry.* 255, *ante*, *p.* 392. In the same manner, a power of attorney to transfer government stock, *Fauntleroy's case*, 1 *Moody*, *C. C.* 56, 2 *Bingh.* 413, and an indenture of apprenticeship. *Jones's case*, 2 *East*, *P. C.* 991, 1 *Leach*, 366. Where a forged deed is altered, the party may be convicted for forging and uttering it in the state in which it was so altered. *Kinder's case*, 2 *East*, *P. C.* 855.

Though the instrument in question may not comply with the directory provisions of a statute, it may still be described as a deed. *Lyon's case*, *Russ. & Ry.* 255, *ante*, *p.* 392.

FORGING BILLS OF EXCHANGE, PROMISSORY NOTES, AND WARRANTS AND ORDERS FOR PAYMENT OF MONEY AND DELIVERY OF GOODS.

By 1 W. 4. c. 66. s. 3, it is enacted, (*inter alia*) that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on, or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of

any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony.

By the following section, if any instrument, however designated, is in law a bill of exchange, or promissory note, for the payment of money, or an acceptance, &c., or an undertaking, &c., within the intent and meaning of the act, the person forging, &c., may be indicted as an offender against that act, and punished accordingly.

By the 10th section of the same stat. 1 W. 4. c. 66, if any person shall forge, or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged, or altered, any warrant, order, or request, for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such person shall be guilty of felony, &c., the punishment being transportation for life, or not less than seven years, or imprisonment for four, and not less than two years.

Forging an *indorsement* upon a warrant or order for the payment of money, is not within the above section. *Arscott's case*, 6 *C. & P.* 408.

Proof of forging bills and notes.] In order to bring the case within the statute, the instrument in question, which is laid to be a bill of exchange or promissory note, must purport on the face of it, to be legally such. Therefore, where it was in the following form :—" I promise to pay the bearer, one guinea on demand, here in cash, or Bank of England note ;" the judges were of opinion, that this was not a note for the payment of money within the stat. 2 G. 2. c. 25, the guinea being to be paid in cash or a Bank of England note, at the option of the payer. *Wilcock's case*, 2 *Russell*, 457.

But it is not necessary, in order to constitute a promissory note for the payment of money within the statute, that it should be negotiable. The prisoner was convicted of forging a promissory note, in the following form :—

" On demand, we promise to pay to Messdames S. W. and S. D., stewardesses, for the time being, of the Provident Daughters' Society, held at Mr. Pope's, or their successors in office, 64*l.*, value received,

For C. F. and Co.,
J. F."

It was moved in arrest of judgment, that this was no promissory note ; but the judges were of a different opinion, saying, that it was not necessary that it should be negotiable, and that it was immaterial whether the payees were legally stewardesses,

and that their successors could not take the note. *Box's case*, 2 *Russell*, 460, *Russ. & Ry.* 300, 6 *Taunt.* 325.

So the offence will amount to forgery, where the bill of exchange is not in a negotiable state, from being drawn by the prisoner in his own favour, and not indorsed by him. The prisoner was charged with forging a bill, purporting to be drawn by Atherton and Co., of Preston, on Denison and Co., of London, payable to himself. The intent charged was, in one count, to defraud Atherton and Co., and in another count, to defraud one M. Yates. It appeared that the prisoner had placed the bill in the hands of Mrs. Yates, an innkeeper, as a security for his account, without indorsing it. The judge (Mr. Baron Graham) told the jury that the use made by the prisoner of the instrument, was conclusive evidence of his fraudulent intent, and the jury found a verdict of guilty. The judge afterwards respited the sentence, doubting whether he ought not to have left the question of fraudulent intention more open to the jury, in which case they might have found that the prisoner did not mean to defraud any person, but by paying his reckoning, and taking his bill, to make no further use of it. On a reference to the judges, however, they were of opinion that the facts amounted to forgery, and with a fraudulent intent, the bill having been given to the landlady to obtain credit, though as a pledge only. *Birkett's case*, *Russ. & Ry.* 86.

Even before the late statute, (1 W. 4. c. 66. s. 4,) it was held, that the instrument was not the less a bill of exchange, if, containing the requisites which constitute a bill of exchange in law, it professes also to be drawn in pursuance of some particular statute, with the requisitions of which it fails to comply. Thus, a bill drawn upon commissioners of the navy for pay, was held to be a bill of exchange, although it was not such an instrument as was warranted by the stat. 35 G. 3. c. 94. *Chisholm's case*, *Russ. & Ry.* 297.

It has been already stated, that where the instrument alleged to be a promissory note is not signed, it cannot be treated as such. *Pateman's case*, *Russ. & Ry.* 455, *ante*, *p.* 395. So where the name of the payee is in blank. *Randall's case*, *Russ. & Ry.* 195, *ante*, *p.* 396. So an instrument for the payment of money under 5*l.*, but unattested. *Moffat's case*, 1 *Leach*, 431, *ante*, *p.* 396.

As to the forging of foreign bills, &c. *vide ante*, *p.* 410.

Proof of forging an order or warrant for the payment of money or delivery of goods.] In an indictment under the 5th section of the 1 W. 4, for forging an order for the payment of money, it must appear, either upon the face of the instrument itself, or by proper averments in the indictment, that the instrument bears the character of an order. The prisoner was charged with forging "a certain order for payment of money, as follows:"

" Gentlemen, London, April 24, 1809.
Please to pay the bearer on demand fifteen pounds, and accompt it to

Your humble servant,
Charles H. Ravenscroft.

Payable at Messrs. Masterman & Co.,
White Hart Court,
Wm. Mc Inerheney."

The prisoner being convicted, a majority of the judges, on a case reserved, held that this was not an order for the payment of money, but Mansfield C. J., Wood B. and Graham B., held that it was. *Ravenscroft's case*, *Russ. & Ry.* 161.

To constitute an order for the payment of money, within the statute, it is not necessary that the instrument should specify in terms the amount ordered to be paid. Where the order was, " Pay to Mr. H. Y. or order, all my proportion of prize money due to me for my services on board His Majesty's ship Leander," it was objected that this was not an order for the payment of money, as no sum of money was mentioned, but the prisoner was convicted, and the judges held the conviction right. *M'Intosh's case*, 2 *East*, *P. C.* 942.

In the construction of the words " warrant" and " order" for the payment of money, it has been held that instruments which in the commercial world have peculiar denominations are within the meaning of those words, if they be in law orders or warrants. 2 *East*, *P. C.* 943. Thus a bill of exchange may be described as an order for the payment of money, for every bill of exchange is in law an order for the payment of money, though not *vice versâ*. *Lockett's case*, 2 *East*, *P. C.* 940, 943, 1 *Leach*, 94. *Sheppard's case*, 2 *East*, *P.C.* 944, 1 *Leach*, 226. So a bill of exchange is a " warrant for the payment of money," and may be described in the indictment as such, for if genuine, it would be a voucher to the bankers or drawers for the payment. *Willoughby's case*, 2 *East*, *P. C.* 944.

The instrument, as set forth in the indictment, must appear to be a request, &c., and if, in words, it does not so purport, it must be explained by proper innuendos. Thus, where the prisoner was indicted for disposing of and putting off a certain forged request, as follows:—

" Per Bearer,
2¼ Counterpain,
T. Davies,
88, Aldgate. E. Twell."

And it was proved by Davies, whose name was forged, that they generally wrote their orders, " Send per bearer," or " per bearer," and that such orders were common in their business, and it was objected that this did not purport to be a request

within the 1 W. 4. c. 66, and that it was not addressed to any one, the judges were unanimously of opinion, that the words "per bearer" did not necessarily import "send per bearer," but might mean, "I have sent per bearer," and that there ought to have been an innuendo to explain them. They seemed to think an address not necessary. *Cullen's case*, 1 *Moody, C. C.* 300. The latter point again arose in a case which occurred soon afterwards. The prisoner was indicted for uttering a forged request for the delivery of goods in the words and figures following:—

"Gentlemen,

Be so good as to let bearer have 5¼ yards of blue to pattern, &c. and you will oblige

W. Reading, Mortimer St."

The request was not addressed to any one. The prisoner being convicted, the recorder respited the judgment, to take the opinion of the judges on the question, whether, as the request was not addressed to any individual person by name or description, it was a request for the delivery of goods within the words and true intent of the statute. All the judges who were present at the meeting held the conviction right. *Carney's case*, 1 *Moody, C. C.* 351.

It seems, says Mr. East, to be now settled, that if the warrant or order do not purport on the face of it, or be shown, by proper averments, to be made by one having authority to command the payment of the money, or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter of it; but only purport to be a request to advance the money, or supply the goods on the credit of the party applying, which the other may comply with or not, as he thinks proper, it is not a warrant or order within the statute. 2 *East, P. C.* 936. Thus a note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, was held not to be a warrant or order for the delivery of goods, within the statute (7 G. 2. c. 22.) The judges, on a case reserved, said, that the words "warrant or order," as they stood in the act, were synonymous, and imported that the person giving such warrant or order had, or at least, claimed an interest in the money or goods which were the subject matter of it, and had, or at least, assumed to have a disposing power over them, and took upon himself to transfer the property, or at least, the custody of them to the person in whose favour such warrant or order was made. One of the judges doubted, and another of their lordships dissented. *Mitchell's case*, 2 *East, P. C.* 936. The prisoner was indicted for forging the following "order for delivery of goods." "Sir, please to let the bearer, Capt. Geo. Williams, have 12 barrels

of tar.—W. Robinson." It appeared that the prisoner was not the owner of, and had not any special interest in the goods in question, nor had he any authority to send such an order, if it had been genuine. Being convicted, the judges, on a case reserved, held that it was not an order within the act, on the authority of *Mitchell's case*, though most of them said, they should have doubted the propriety of that determination had it been *res integra*, but having been so long acquiesced in, they thought it should not now be departed from. *Williams's case*, 2 *East*, *P. C.* 937, 1 *Leach*, 114. *Ellor's case*, 2 *East*, *P. C.* 938. The prisoner was indicted for forging an order for the delivery of goods. The indictment stated, that J. L. Desormeaux, silk dyer, delivered to F. Purser, silk dyer, 78lbs. of raw silk, &c., and that the prisoner well knowing the premises, forged a certain warrant or order for the delivery of the goods, with the name of L. Desemockex thereto subscribed, purporting to have been signed by one Louis Desormeaux by the name of L. Desemockex, he, the said L. Desormeaux, then and there being the servant of the said J. L. D. in his business of a silk dyer, and purporting to be a warrant or order from the said L. Desormeaux, as such servant of the said J. L. D. for the delivery of, &c. the tenor of which, &c. is as follows:—

"Please to send by the bearer 8lb. of that whorpe hun market,

L. Desemockex."

It appeared in evidence that the prisoner, who had lived for a fortnight with the prosecutor as servant, went to Purser, to whom certain silk had been delivered, with the forged order, which he represented as coming from Mr. L. Desormeaux, the son of the prosecutor, who managed part of his father's business. The prisoner being convicted, the judges on a reference to them, on the authority of *Mitchell's* and *Williams's case*, *supra*, held the conviction wrong. They said that the order must be directed to the holder of, or person interested in, or having possession of the goods, but that the order in question was not directed to any person, merely expressing a desire that 8lbs. of silk should be delivered to the bearer, without any direction from whom it was to be received. On that ground, therefore, the judges were of opinion that this was not a warrant or order within the statute. They also said, that with regard to the form of the indictment, it ought to have appeared therein that the person whose name was subscribed to the order had authority to make it, which was not to be collected from the words of the present indictment. *Clinch's case*, 2 *East*, *P. C.* 938, 1 *Leach*, 540. It has been observed as a consequence of this decision, that if the indictment states the person in whose name the order is forged to have been servant to J. S.,

and that the order was for the delivery of goods of J. S., it ought to show that the servant, as such, had a disposing power over the goods. *MS. Bayley, J.* 2 *Russell*, 474. (*n.*)

The prisoner was indicted for forging a certain order for the payment of money; that is to say,

"Mr. Thomas,

Sir—You will please to pay the bearer, for Rd. Power, three pounds, for three weeks, due to him, a country member, and you will much oblige, your's, &c.

J. Beswick.

To Mr. Thomas, Gray's Inn Lane."

The indictment then averred an intent to defraud J. Thomas, who had in his hands a large sum of money belonging to a Friendly Society. Beswick, whose name was forged, was Secretary to the Society, and he proved that there was no person named Rd. Power, a member. No evidence was given of the rules of the Society. The Recorder, in the absence of such evidence, thought that there was nothing to prove that Beswick had any disposing power over the money in the hands of Thomas; and upon a case reserved, the judges (except Gaselee and Parke, Js.) held that this was not an order on the face of it, and that the conviction was wrong. *Baker's case*, 1 *Moody, C. C.* 231. Upon the same principle it was held, that a forged order, for the purpose of obtaining a reward for the apprehension of a vagrant, not being under seal as required by the statute 17 G. 2. c. 5. s. 5, (repealed) and not being directed to the high constable, was not an order for the payment, although orders in that form had been generally acted upon. Bayley, J., before whom the prisoner was tried, said, to bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case the party, looking at the act, must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order; and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no right to make such an order; if he had any, it was derived from the statute; but he had no power to make such an order as this; and if such a one had been made, the treasurer ought not to have obeyed it. *Rushworth's case*, 2 *Russell*, 471. On a reference to the judges, they held that this direction was right. *Russ. & Ry.* 317. *See Froud's case, Russ. & Ry.* 389.

If the instrument purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person be in existence as the order purports

to be made by, it is still an order within the statute. 2 *East, P. C.* 940. The prisoner, Charles Lockett, was convicted of uttering a forged order for the payment of money, as follows:—"Messrs. Neale and Co., Pay to Wm. Hopwood, or bearer, £16 10*s.* 6*d.* R. Vennist." The prisoner had given this order in payment for goods. No such person as Vennist kept cash with Neale and Co.; nor did it appear that there was any such person in existence. The judges, on considering the case, held it to be forgery. They thought it immaterial whether such a man as Vennist existed or not; or if he did, whether he kept cash with Neale and Co. It was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. *Lockett's case*, 2 *East, P. C.* 940, 1 *Leach*, 94. The same point was again argued in *Abraham's case*, 2 *East, P. C.* 941, 1 *Leach*, 96. (*n.*)

In a forged order for the delivery of goods, it does not appear to be necessary that the particular goods should be specified in the order, provided it be in terms intelligible to the parties themselves to whom the order is addressed. 2 *East, P. C.* 941. The prisoner was indicted for forging an order for the delivery of goods, as follows:—"Sir, Please to deliver my work to the bearer. Lydia Bell." Mrs. Bell, a silversmith, proved that she had sent several articles of plate to Goldsmith's-hall, to be marked. The form of the order was such as is usually sent on such occasions, except that in strictness, and by the rule of the plate-office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it. The prisoner being convicted, the judges were of opinion that the conviction was right. *Jones's case*, 2 *East, P. C.* 941, 1 *Leach*, 53.

Nor will the order be less the subject of forgery on account of its not being available, by reason of some collateral objection not appearing on the face of it. 2 *Russell*, 475. The prisoner was convicted of forging an order for the payment of money, and it appeared that the party whose name was forged was a discharged seaman, who was, at the time the order was dated, within seven miles of the place where his wages were payable; under which circumstance his genuine order would not have been valid, by virtue of the statute 32 G. 3. c. 34. s. 2. The judges, however, held the conviction proper, the order itself, on the face of it, purporting to be made at another place beyond the limited distance. *M'Intosh's case*, 2 *East, P. C.* 942, 2 *Leach*, 883, 2 *Russell*, 475.

The prisoner was charged with forging "a certain warrant *and* order for the payment of money." The instrument in question was a forged check upon a banker. It was objected that this charged an offence with regard to two instruments; but Bosanquet, J. was of opinion that the indictment was

sufficient. He thought the instrument was both a warrant and an order; a warrant authorising the banker to pay, and an order upon him to do so. *Crowther's case*, 5 *C. & P.* 316.

FORGING RECEIPTS.

By the 1 W. 4. c. 66. s. 10, if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any acquittance or receipt, either for money or goods, or any accountable receipt, either for money or goods, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

With regard to what, on the face of it, will constitute a receipt, the following case was decided upon the repealed statute. The prisoner was convicted of uttering a forged *receipt for money*, as follows, *viz.*:—

"18th March, 1773.

"Received the contents above, by me,

Stephen Withers."

The prisoner was employed by a lottery shopkeeper to carry out prize-money, and had the following account delivered to him to carry out:—

"Mr. Withers.

"One 16th of a £20. prize	£1	5	0
Deduct, &c.	0	1	0
	£1	4	0"

To this account the prisoner forged the receipt in question. It was objected for the prisoner, that the receipt being for "contents above," it and the bill were one entire thing, and the whole ought to have been set out; and that it did not appear by the indictment what the receipt was for. But the judges were of opinion that the indictment was good, for it was "Received the contents above," which showed it to be a receipt for something, though the particulars were not expressed, and it was laid to be a forged *receipt for money*, under the hand of S. W., for 1*l.* 4*s.* 0*d.*; and the bill itself was only evidence of the fact, and showed it to be a receipt for money as charged. *Testick's case*, 2 *East*, *P. C.* 925.

What is to be considered a "receipt for money," was decided in the following case:—The prisoner was indicted under the 2 G. 2. c. 25. & 31 G. 2. c. 22. s. 78, for forging a certain *receipt for* money, *viz.* &c.; and in other counts, upon the statute 7 G. 2. c. 22, with altering *a certain accountable receipt for bank notes for payment of money*, with intent to defraud the Bank of England. It appeared that the prisoner was accountant to the London Assurance Company, who kept their cash with the Bank of England, who furnished them with a book in which the clerk of the Bank entered all sums paid in by the Company, and signed his name to the entry. One of these entries was altered by the prisoner, from 210*l.* to 3,210*l.*, which was the forgery in question. It was objected for the prisoner, that the statutes 2 & 31 G. 2. mentioned only *money* and *goods*, and not *bank notes*; and the statute 7 G. 2. related only to *persons*, and not to *corporations*. The prisoner was acquitted upon the first count, and on a reference to the judges, with regard to the second objection, they were of opinion that the statute did not apply to corporations. *Harrison's case*, 2 *East*, *P. C.* 926, 1 *Leach*, 180. It appears, from the report of this case in *Leach*, that the judges expressed a clear opinion that the entry in the bank book was an *accountable receipt* within the meaning of the act, but no opinion to that effect was publicly given. See 2 *East*, *P. C.* 928.

In an indictment for forging a receipt to an assignment for payment of a certain sum in a navy bill, it is not sufficient to state such navy bill and such assignment, and then to charge that the prisoner forged a receipt for money mentioned in the said navy bill as follows; *viz.* "Wm. Thornton, Wm. Hunter;" because the mere signing such names, unless connected with the previous matter, does not necessarily purport on the face of it to be a *receipt*; but it should be averred that such navy bill, &c., together with such signature, did purport to be, and was a receipt, &c. The judges, to whom the case was referred, said that the name itself, as stated in the indictment, was no receipt, though, coupled with the navy bill, it might form one. But then it ought to be so stated, as was done in a case referred to in the Crown Circuit Companion, which was an indictment for uttering a forged warrant for the payment of a South Sea annuity, wherein it was stated that one D. H. was a clerk of the S. S. Company, intrusted to sign warrants for the payment of money, and that one H. P., having in his custody a certain warrant, &c., signed by the said D. H., and directed to R. R., the cashier of the company, for the payment of 8*l.* to one W. D., on the back of which said warrant the said W. D. had signed his name; *which said paper, partly printed, &c., together with the said indorsement, in form aforesaid, did purport to be and was a receipt, acquittance, and discharge under the hand of the said W. D. for the said sum of* 8*l.*; he the said

H. P. did feloniously, &c. alter, &c. *Hunter's case*, 2 *East, P. C.* 928, 2 *Leach*, 624. Upon the authority of the foregoing case, the following was decided. The prisoner was indicted for forging "a certain receipt for money," as follows, that is to say, "Settled, S. M.," with intent, &c. It appeared in evidence, that the prisoner, who was employed to receive and pay the monies of a subscription fund, had forged the receipt in question at the bottom of a bill sent in to the trustees of the fund. It was contended for the prisoner, that on the face of the indictment there did not purport to be a "receipt for money," and that it should have been shown to be such by proper averments; and the court, (Thompson B. and Graham B.) on the authority of *Hunter's case, supra*, were of that opinion, and held that the indictment was defective. *Thompson's case*, 2 *Leach*, 910. The indictment charged that a precept had been issued by one C. H., high constable, &c., directed to the overseers of the poor of C., to collect 21*l.* 11*s.* 4*d.*; that a *receipt for money, viz.* for the sum of 21*l.* 11*s.* 4*d.* had been forged, by falsely affixing and cementing to the said precept, at the foot thereof, a certain receipt, in the hand-writing of one Henry Hargreaves, of the tenor following, that is to say, "1825. Recd., H. H.," which had, before then, been made and written by the said Henry Hargreaves as a receipt for other money, and that the prisoner published, &c. It was objected that there ought to have been an averment to explain what was meant by the word "Recd.," and what by the initials H. H. The prisoner being convicted, the judges considered the case, and held the indictment bad, because there was nothing to show what the initials H. H. meant, or what connection Hargreaves had with Hindle, or with the receipt. *Barton's case*, 1 *Moody, C. C.* 141.

A scrip receipt, with the blank for the name of the subscriber not filled up, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a "receipt for money." Grose J., in delivering the opinion of the judges in this case, observed that the instrument, the tenor of which was necessarily set forth in the indictment, was not a receipt for money in contemplation of law, within the stat. 2 G. 2. c. 25. That it was the duty of the cashier, appointed by the bank, to receive such subscriptions, to fill up the receipt with the names of the subscribers, and until the blank was filled up, the instrument did not become an acknowledgment of payment, or, in other words, a *receipt for money*; while, in such a state, it was no more a receipt than if the sum professed to be received were omitted. That in *Harrison's case, (ante, p.* 422.) the book, in which the entry was made, imported to be a book containing receipts for money received by the bank from their customers, and showed that the money was received from the person to whom the book belonged. *Lyon's case*, 2 *East, P. C.* 933, 2 *Leach*, 597.

In the following case, a point arose with regard to the party intended to be defrauded by certain forged receipts. Grose J., in delivering the opinion of the judges, stated the facts of the case. He said the prisoner was tried on an indictment charging him, in the first count, with having uttered twenty-two forged acquittances and receipts for money, purporting to be signed by different persons, as for money received by John Collinridge. There were two other counts, one for forging, and another for uttering one of the receipts. Previously to the trial, it was submitted to the court by the prisoner's counsel, that the prosecutor ought to be directed on which particular receipt he intended to proceed; but the indictment charging him with having uttered all the receipts at one and the same time, the objection was overruled, and the judges were of opinion that this application was properly refused; for it was proved that the prisoner had uttered all the receipts at the same time to the solicitor of the navy board, as vouchers for the account of Collinridge, a public accountant, deceased, which the prisoner had undertaken to get passed at the navy board. The second objection was, that as these receipts purported to be receipts given to Collinridge, by the workmen whom he employed, for work done and materials found for *him*, the navy board had no concern with them, and the offence was not within the 2 G. 2. c. 25. s. 1. or 31 G. 2. c. 22.; for that the workmen were solely employed by Collinridge, and not by the navy board; and that, as he only was answerable, it was indifferent to the board whether the sums had been paid or not. In answer to this objection, the learned judge observed, that as the work was done for the commissioners of the navy board, the persons employed for that purpose by *him*, were employed not solely on his own account, but also on account of the king; and these receipts, if genuine, would have been legal vouchers for his account, and would have entitled him to a discharge from the navy board. The judges, therefore, were of opinion, that the instruments were forged receipts for money within the statute, and that they had been uttered with intent to defraud the king. *Thomas's case*, 2 *Leach*, 877, 2 *East*, *P. C.* 934.

To constitute a receipt for money, within the statute, the instrument must purport to be an acknowledgment by some one, of money having been received. The prisoner was indicted for forging a receipt and acquittance, (setting it out.) The instrument was as follows:

"William Chinnery, Esq. paid to X *tomson* the som of 8 pounds.

feb. 13, 1812."

It was not subscribed, but was uttered by the prisoner as a genuine receipt, and taken as such by Mr. Chinnery's housekeeper. The prisoner being convicted, the judges held the conviction wrong, being of opinion that this could not be

considered as a receipt. It was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof. *Harvey's case, Russ. & Ry.* 227.

FORGERIES RELATING TO THE PUBLIC FUNDS.

False entries in books of Bank, and transfer in false names.] By the 1 W. 4. c. 66. s. 5, if any person shall wilfully make any false entry in, or wilfully alter any word or figure in any of the books of account, kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fisheries, commonly called the South Sea Company; in which books, the accounts of the owners of any stock, annuities, or other public funds, which now are or hereafter may be transferrable at the Bank of England, or at the South Sea House, shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. As to the punishment, *vide ante, p.* 411.

Proof of forging tranfers of stock, and of power of attorney to transfer.] By the 1 W. 4. c. 66. s. 6, it is enacted, that if any person shall forge or alter, or shall utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferrable at the Bank of England, or at the South Sea House, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is herein-before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent

in any of the several cases aforesaid to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner as if such person were the true and lawful owner; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. As to punishment of death in the above cases, see the 2 & 3 W. 4. c. 123, *ante*, *p.* 411.

In the following cases which was an indictment founded on the stat. 33 G. 3. c. 30, several points were ruled with regard to indictments for forging a transfer of stock. Three objections were taken on behalf of the prisoner, 1st, that there did not appear in evidence to be any acceptance of the transfer by the party who was alleged to be possessed of the stock, till which time it was said the transfer was incomplete; 2dly, that till the stock was accepted, no transfer at all could be made; 3rdly, that the instrument was not witnessed, which, according to the printed forms used by the bank should have been done. The prisoner having been convicted, the opinion of the judges on the case was delivered by Buller J. He observed, that as to the two first objections, two answers had been given, 1st, that the stock vested by the mere act of transferring it into the name of the party, and that if he had died before he accepted it, it would have gone to his executors as part of his personal estate; 2d, that the nature of the offence would not have been altered if the party had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete, if the party had really had no stock. As to the third objection, the judges all thought that the entry and signatures, as stated in the indictment, were a complete transfer, without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection. *Gade's case*, 2 *East*, *P. C.* 874, 2 *Leach*, 732.

Proof of personating owner, and endeavouring to transfer stock.] By the 7th section of the 1 W. 4. c. 66, it is enacted, that if any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferrable at the Bank of England or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer

any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner as if such offender were the true and lawful owner, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

The following case was decided upon the former statute 31 G. 3. c. 22. The prisoner was indicted for personating one Isaac Hart, the proprietor of certain stock, and thereby endeavouring to receive from the Bank of England the sum of, &c. It appeared that the prisoner, representing himself to be Isaac Hart, received from the dividend-payer, at the bank, a dividend warrant for the sum due, on receiving which, instead of carrying it to the pay-office, he walked another way, and made no attempt to receive the money. It was objected for the prisoner, that there was no proof of his having endeavoured to receive the money, but being convicted, the judges held the conviction right. They said, that the manner in which he applied for and received the warrant was a personating of the true proprietor, and that he thereby endeavoured to receive the money, within the intent and meaning of the act of parliament. *Parr's case*, 1 *Leach*, 434, 2 *East*, *P. C.* 1005.

Proof of forging attestation to power of attorney or transfer of stock.] By the 8th section of the 1 W. 4. c. 66, it is enacted, that if any person shall forge the name or hand-writing of any person, as or purporting to be a witness attesting the execution of any power of attorney or other authority, to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in the said act before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other authority, with the name or hand-writing of any person forged thereon, as an attesting witness, knowing the same to be forged, every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

Proof of clerks in the bank making out false dividend warrants.] By the 9th section of the 1 W. 4. c. 66, it is enacted, that if any clerk, officer, or servant of, or other person employed or entrusted by the governor and company of the Bank of England, or the governor and company of merchants, commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than

the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

Proof of forging exchequer bills—East India bonds, &c.] By the 3d section of the statute 1 W. 4. c. 66, it is enacted, (*inter alia*) that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged, or altered, any exchequer bill, or exchequer debenture, or any indorsement on, or assignment of, any exchequer bill, or exchequer debenture, or any bond under the common seal of the united company of merchants of England, trading to the East Indies, commonly called an East India bond, with intent in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. As to the punishment, *vide ante*, *p.* 411.

FORGERY, AND SIMILAR OFFENCES WITH REGARD TO BANK OF ENGLAND AND BANKERS' NOTES.

The various statutes passed for the purpose of preventing the forgery of bank notes are repealed, and their provisions re-enacted by the statute 1 W. 4. c. 66, which contains the following clauses relating to this head of forgeries.

Proof of knowingly purchasing or receiving, or having in possession, forged bank notes.] By section 12 of the above statute, it is enacted, that if any person shall, without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

Proof of making or having, without authority, any mould for making paper with the words "Bank of England" visible in the

substance, or for making paper with curved bar lines, &c., or selling such paper.] And by section 13, it is enacted, that if any person shall, without the authority of the governor and company of the Bank of England, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words "Bank of England" visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of the paper; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper whatsoever with the words "Bank of England" visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall, by any art or contrivance, cause the words "Bank of England" to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

Proviso as to paper used for bills of exchange, &c.] And by sec. 14. it is provided and enacted, that nothing therein contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks, visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the governor and company of the Bank of England.

Proof of engraving on any plate, &c. any bank-note, blank bank-note, &c. or using or having such plate, &c., or uttering or having paper upon which a blank bank-note, &c. shall be printed, without authority.] And by section 15, it is enacted, that if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or blank bill of exchange, or part of a promissory note or bill of exchange, purporting to be a bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill, or part of a bank-note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill, or part of a bank-note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank-note, blank bank bill of exchange, or blank bank post bill, or part of a bank-note, bank bill of exchange, or bank post bill, shall be made or printed; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

Proof of engraving on any plate, &c. any word, number, or ornament resembling any part of a bank-note, &c.] And by sec. 16, it is enacted, that if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank-note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making upon any paper or other material the impression of any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble, any part of a bank-note, bank bill of exchange, or bank post bill, without

such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

Proof of making or having in possession any mould for manufacturing paper, with the name of any bankers appearing in the substance.] And by sec. 17, it is enacted, that if any person shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the Bank of England) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers shall appear visible; or if any person shall, without such authority, to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers to appear visible in the substance of the paper upon which the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year.

Proof of engraving on any plate, &c. any bill of exchange or promissory note of any bankers, &c.] And by sec. 18, it is enacted, that if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any

bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate, or company carrying on the business of bankers, (other than and except the Bank of England,) without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or company carrying on the business of bankers, without such authority, to be proved as aforesaid; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling, or apparently intended to resemble, such subscription, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble, any such subscription, shall be made or printed, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year.

FORGING ENTRIES IN PUBLIC REGISTERS, ETC.

The forging of entries in registers of marriages, &c. was formerly provided against by the statutes 52 G. 3. c. 146, and 4 G. 4. c. 76; but the provisions of those statutes on this subject are now repealed, and re-enacted in substance in the 1 W. 4. c. 66.

By the 20th section of that statute, it is enacted, that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which has been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry in England, any false entry of any matter relating to

any baptism, marriage, or burial, or shall forge or alter in any such register any entry of any matter relating to any baptism, marriage, or burial; or shall utter any writing, as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered, or shall utter any copy of such entry, knowing such entry to be false, forged, or altered, or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register or any part thereof; or shall forge or alter, or shall utter knowing the same to be forged or altered, any licence of marriage; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.

And by section 21, it is provided and enacted, that no rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial respectively by him solemnized, shall be liable to any of the penalties herein mentioned if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid: Provided also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid.

And by section 22, reciting, that whereas copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declaration of the rector, vicar, curate, or officiating minister of every parish, district-parish, and chapelry in England where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which

such parish, district-parish, or chapelry may be situated; it is enacted, that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall utter knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year.

FORGERY OF STAMPS.

By 52 Geo. 3. c. 143. s. 7, it is enacted, that if any person shall, after the passing of that act, forge or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, die, or plate, which, in pursuance of any act or acts of parliament, shall have been provided, made, or used, by or under the direction of the commissioners appointed to manage the duties on stamped vellum, parchment, and paper, or by or under the direction of any other person or persons legally authorized in that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said commissioners for the ace of spades, to be used with any playing cards, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, the impression, or any resemblance of the impression, of any such mark, stamp, die, or plate, as aforesaid, upon any vellum, parchment, paper, card, ivory, gold, or silver plate, or other material, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment, paper, card, ivory, gold, or silver plate, or other material, with any such forged or counterfeited mark, stamp, die, or plate, as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties, or any part of the duties, under the care and management of the said commissioners; or, if any person shall utter or sell, or expose to sale, any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, having there-

upon the impression, or any such forged or counterfeited mark, stamp, die, or plate, or any such forged or counterfeited impression as aforesaid, knowing the same respectively to be forged or counterfeited; or, if any person shall privately or secretly use any such mark, stamp, die or plate, which shall have been so provided, made or used, by or under such direction as aforesaid, with intent to defraud his Majesty, his heirs, or successors, of any of the duties, or any part of the duties, under the care and management of the said commissioners, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy. As to the punishment, *vide ante, p.* 411.

And by 55 Geo. 3. c. 184. s. 7, it is enacted, that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp, or die, or any part of any stamp, or die, which shall have been provided, made, or used, in pursuance of that act, or in pursuance of any former act or acts, relating to any stamp duty or duties, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression, or any part of the impression, of any such stamp, or die, as aforesaid, upon any vellum, parchment or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment, or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties hereby granted, or any part thereof; or if any person shall utter, or sell or expose to sale, any vellum, parchment or paper, having thereon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited, or resembled impression, or part of impression, as aforesaid, knowing the same respectively to be forged, counterfeited or resembled, or if any person shall privately and secretly use any stamp or die, which shall have been so provided, made or used, as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the said duties, or any part thereof; or if any person shall fraudulently cut, tear or get off, or cause or procure to be cut, torn or got off, the impression of any stamp or die, which shall have been provided, made or used, in pursuance of that or any former act, for expressing or denoting any duty or duties, under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment or paper, or any instrument or writing charged or chargeable with any of the duties thereby granted; then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting,

or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

By the statute 3 & 4 W. 4. c. 97. s. 11, it is enacted, that whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to vend or deal in stamps, or who shall have been so licensed at any time within six calendar months then next preceding, such vellum, parchment, or paper having thereon any false, forged, or counterfeit stamp, mark, or impression, resembling or representing, or intended or liable to pass or be mistaken for any stamp, mark, or impression of any die, plate, or other instrument, which at any time whatever hath been, or shall or may be provided, made, or used, by or under the direction of the commissioners of stamps, for the purpose of expressing or denoting any stamp duty whatever, then, and in every such case, the person in whose possession such vellum, parchment, or paper shall be so found, shall be deemed and taken to have so had the same in his possession, with intent to vend, use, or utter the same, with such false, forged, or counterfeit stamp, mark, or impression thereon, unless the contrary shall be satisfactorily proved; and such person shall also be deemed and taken to have such vellum, parchment, or paper so in his possession, knowing the stamp, mark, or impression thereon to be false, forged, and counterfeit, and such person shall be liable to all penalties and punishments by law imposed or inflicted upon persons vending, using, uttering, or having in possession false, forged, or counterfeit stamps, knowing the same to be false, forged, or counterfeit, unless such person shall, in every such case, satisfactorily prove that such stamp or stamps was or were procured by or for such person, from some distributor of stamps appointed by the said commissioners, or from some person licensed to deal in stamps, under the authority of that act.

By section 12 of the same statute, it is enacted, that if any person shall, knowingly and without lawful excuse, (the proof whereof shall lie on the person accused,) have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or instrument, resembling or intended to resemble, either wholly or in part, any die, plate, or other instrument, which at any time whatever hath been, or shall or may be provided, made, or used by, or under the direction of the commissioners of stamps, for the purpose of expressing or denoting any stamp duty whatever; or, if any person whatever shall, knowingly and without lawful excuse, (the proof whereof shall lie on the person accused,) have in his possession any vellum, parchment, or paper, having thereon the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument, as

aforesaid, or having thereon any false, forged, or counterfeit stamp, mark, or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been, or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression, to be false, forged, or counterfeit, or if any person shall fraudulently use, join, fix, or place for, with, or upon any vellum, parchment, or paper, any stamp, mark, or impression, which shall have been cut, torn, or gotten off, or removed from any other vellum, parchment, or paper; or if any person shall fraudulently erase, cut, scrape, discharge or get out of or from, any stamped vellum, parchment, or paper, any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such vellum, parchment, or paper, or that the same may be used for any deed, instrument, matter or thing, in respect whereof any stamp duty is, or shall or may be, or become payable; or, if any person shall knowingly use, utter, sell, or expose to sale, or shall knowingly, and without lawful excuse, (the proof whereof shall lie on the person accused,) have in his possession, any stamped vellum, parchment, or paper, from or off, or out of which any such name, sum, date, or other matter or thing as aforesaid, shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid, then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

Proof of the transposing—intent.] It does not require any fraudulent intent to be proved, in order to bring the party within the statute, there being no words in the statute to that effect. *Ogden's case*, 6 *C. & P.* 631.

Proof of the transposing—variance.] Upon an indictment for removing, from one silver knee-buckle to another, certain stamps, marks, and impressions; to wit, the King's head, and the lion rampant, on producing the knee-buckle in evidence, it appeared that the lion was a lion passant, and not a lion rampant; and this was held to be a fatal variance. *Lee's case*, 1 *Leach*, 416.

FORGERY OF OTHER PUBLIC DOCUMENTS.

There are a great variety of statutes containing enactments against the forging of public documents of various kinds. A reference to the principal of these is all that can be given in the present work.

Forgeries relating to the navy and army.] 11 G. 4. & 1 W. 4. c. 20, for amending and consolidating the laws relating to the pay of the royal navy. See also 57 G. 3. c. 127; 10 G. 4. c. 26. 23 G. 3. c. 50, forging name of paymaster of the forces. 47 G. 3. Sess. 2. c. 25. s. 8. forging names of persons entitled to pay, or pensions. 54 G. 3. c. 86. s. 8, altering names in prize lists. 7 G. 4. c. 16, false certificate or representation as to Chelsea Hospital; s. 38, false personation of officers and soldiers entitled to pay; forging their names, &c. 46 G. 3. c. 45. s. 9, forging name of treasurer of the ordnance. 54 G. 3. c. 151, forging name of agent general of volunteers.

Forgeries relating to the customs and excise.] Forging the name of the receiver or comptroller-general of the customs, is punishable with transportation for life, by 3 & 4 W. 4. c. 51. s. 27. Unauthorised persons making paper in imitation of excise paper, and persons forging or counterfeiting plates or types, are guilty of felony, and subject to transportation, by 2 W. 4. c. 16. s. 3; and by section 4, persons counterfeiting permits, or uttering forged permits, are likewise guilty of felony, and punishable in the same manner. By the 7 & 8 G. 4. c. 56, the forging the name of the receiver-general, or comptroller of excise, is made a capital felony; but the capital punishment is taken away by 1 W. 4. c. 66. s. 10. As to forging debentures and certificates, see 59 G. 3. c. 143. s. 10.

Forgeries relating to land tax, &c.] The forgery of contracts for the redemption of the land tax, is provided against by the 52 G. 3. c. 143. So the forging the names of the commissioners of woods and forests, by the 50 G. 3. c. 65.

Forgeries relating to public officers in courts of justice, &c.] Forging the name of the accountant-general of the Court of Chancery, 12 G. 1. c. 32; or of the accountant-general of the Court of Exchequer, 1 G. 4. c. 35; or of the receiver at the Alienation Office, 52 G. 3. c. 143; or of the registrar of the Court of Admiralty, 53 G. 3. c. 151. s. 12; or of certificate of former conviction, 7 & 8 G. 4. c. 28. s. 11.

Forgeries relating to matters of trade, &c.] Forgeries of documents relating to the suppression of the slave trade, are provided against by the 5 G. 4. c. 113. s. 10; forgeries of Mediterranean passes, by the 4 G. 2. c. 18. s. 1; and forgeries of certificates of quarantine, by the 6 G. 4. c. 78.

EVIDENCE IN PARTICULAR PROSECUTIONS,

(CONTINUED.)

FURIOUS DRIVING.

By statute 1 G. 4. c. 4, if any person whatever shall be maimed, or otherwise injured by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman, or other person having the charge of any stage-coach, or public carriage, such wanton or furious driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is thereby declared to be a misdemeanor, and punishable as such, by fine and imprisonment. Provided that nothing in that act contained shall extend or be construed to extend to hackney-coaches being drawn by two horses only, and not plying for hire as stage-coaches,

GAME.

Taking or killing hares, &c., in the night . . 442
Proof of the taking or killing . . . 442
Proof that the offence was committed in some warren, &c., used for the breeding of hares, &c. . 442
Proof of the offence being committed in the night . 443
Taking or destroying game by night . . . 443
Proof of the former convictions . . . 444
Proof of the third offence . . . 444
Proof of the situation and occupation of the land . 444
Unlawfully entering land for the purpose of taking game, being armed 445
Proof of the entering, &c. . . . 445

Proof of the entering or being in the place specified . 445
Proof of the purpose to take or destroy game or rabbits 445
Proof of the being armed, &c. . . . 446
Assault upon persons apprehending offenders . . 446

All offences with regard to game, which are the subject of indictment, are statutable offences, not known to the common law. Such animals being *feræ naturæ*, are not, in their live state, the subjects of larceny. *Vide post, title "Larceny."*

The principal provisions with regard to offences relating to game, are contained in the 7 & 8 G. 4. c. 29; and 9 G. 4. c. 69.

TAKING OR KILLING HARES, &C., IN THE NIGHT, IN GROUND USED FOR BREEDING, &C.

By statute 7 & 8 G. 3. c. 29. s. 30, if any person shall unlawfully and wilfully, in the night, take or kill any hare or coney, in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and shall be punished accordingly. The offence in the day-time is made the subject of a summary conviction.

Upon an indictment under the statute, the prosecutor must prove—1st, the taking or killing of a hare or coney; 2d, that it was in some warren or ground lawfully used for the breeding, &c.; and 3d, that the offence was committed in the night.

Proof of the taking or killing.] It is not necessary to give evidence that the defendant was seen in the act of taking or killing the hare, nor in order to prove a *taking*, is it necessary to show that the animal came actually into his hands. Thus, where the defendant had set wires, in one of which a rabbit was caught, and the defendant, as he was about to seize it, was stopped by the keeper, this was held by the judges to be a *taking* within the stat. 5 G. 3. c. 14, the word *taking* meaning *catching*, and not *taking away*. *Glover's case, Russ. & Ry.* 269.

Proof that the offence was committed in some warren or ground lawfully used for the breeding of hares, &c.] This averment must be proved as laid in the indictment. It must also be

shown that the place was situated in the parish mentioned in the indictment, and that it was in the occupation of the party stated.

Proof of the offence being committed in the night time.] The 7 & 8 G. 4. c. 29, does not contain, like the 9 G. 4. c. 69, any clause declaring what shall be deemed night time. The word, therefore, must be taken to have the same sense as in burglary. *Vide ante, p.* 278.

TAKING AND DESTROYING GAME BY NIGHT.

By statute 9 G. 4. c. 69, s. 1. (repealing 57 G. 3. c. 90,) it is enacted, that if any person shall, after the passing of that act, by night, unlawfully take or destroy any game or rabbits, in any land, whether open or inclosed, or shall, by night, unlawfully enter, or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof, before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period, shall find sureties by recognizance, or in Scotland, by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned, and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction, for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period, shall find sureties by recognizance or bond as aforesaid, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years next following, and in case of not finding such sureties, shall be further imprisoned, and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years, or to be imprisoned, and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, if any person shall

so offend a first, second, or third time, he shall be liable to be punished in like manner as is thereby provided in each case.

Upon a prosecution under this statute, the prosecutor must prove—1, the former convictions; 2, the committing of the third offence; 3, the situation and occupation of the land; 4, the commission of the offence in the place specified.

Proof of the former convictions.] The former convictions may be proved by the production of the records themselves, or of copies thereof. 9 G. 4. c. 64. s. 8.

Proof of the third offence.] The offence must be proved to have been committed in the *night*, and by the 12th section of the 9 G. 4, the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. The precise hour laid is not material, provided it appear that the offence was committed within the above hours. The prosecution (sec. 4,) must be commenced within twelve months.

Proof of the situation and occupation of the land.] The indictment must particularise in some manner the place in which the offence was committed, for being substantially a local offence, the defendant is entitled to know to what specific place the evidence is to be directed. *Ridley's case, Russ. & Ry.* 515. If in the indictment, a name be given to the place, though unnecessarily, such name must be proved as laid. *Owen's case,* 1 *Moody, C. C.* 118. (*Indictment under* 57 *G.* 3. *c.* 90.) And it must be proved that the offence was committed in the particular place. Therefore, where the indictment is for taking or destroying game, such taking or destroying must be proved in the place specified. It is not necessary that the party should be actually seen in the place specified; it is sufficient if it appear from circumstantial evidence that he was there. *Worker's case,* 1 *Moody, C. C.* 165. Where the charge is for entering land with a gun, for the purpose of taking game, the purpose must be proved. Where the indictment alleged an entry into a particular close, with intent *then and there* to kill game, it was held that the intent was confined to the killing of game in that particular place. *Barham's case,* 1 *Moody, C. C.* 151. *Capewell's case,* 5 *C. & P.* 549.

UNLAWFULLY ENTERING LAND FOR THE PURPOSE OF TAKING GAME, BEING ARMED.

By stat. 9 G. 4. c. 69. s. 9, it is enacted, that if any persons to the number of three or more together, shall, by night, unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner.

Upon an indictment under this clause of the statute, the prosecutor must prove, 1st, the unlawful entry by night by three persons or more; 2d, the place in which, &c.; 3d, the purpose to take or destroy game or rabbits; 4th, the being armed with a gun, &c.

It has been ruled that a count on this clause may be joined with a count on section 2, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Finacane's case*, 5 *C. & P.* 551.

Proof of the entering, &c.] The prosecutor must show that at least three persons entered, or *were*, (the words of the statute are, "shall unlawfully enter or be") by night in the place specified. It will not therefore be necessary to show that they *entered* by night, provided they be in the place within the hours meant by the words "by night," *vide ante*, *p.* 444.

Proof of the entering or being in the place specified.] The place must be described in the indictment, and the proof must agree with the allegation. *Vide ante*, *p.* 444. The defendants, to the number of three or more, must be proved to have been in the place named; if one only appear to have been there, all must be acquitted. *Dowsell's case*, 6 *C. & P.* 398.

Proof of the purpose to take or destroy game or rabbits.] In general little difficulty exists with regard to the intent of the

defendants. The circumstance of their being found armed is in itself a strong presumption of their object.

Proof of the being armed with a gun, &c.] Though it must be proved that three persons at least were concerned in the commission of the offence, the statute does not require that it should appear that *each* was armed with a gun or other weapon, the words being "*any* of such persons being armed," &c., and this was held upon the former statute, 57 G. 3. c. 90, which did not contain the word "any." *Smith's case, Russ. & Ry.* 368. It is not necessary that the gun should be found upon any of the defendants. The prisoners were shooting in a wood in the night, and the flash of their guns was seen by a keeper; but before they were seen they abandoned their guns, and were caught creeping away on their knees. Being convicted, the judges held this a being "found armed" within the 57 G. 3. c. 90. *Nash's case, Russ. & Ry.* 386.

Where several go out together, and one only is armed, without the knowledge of the others, the latter are not guilty within the statute. *Southern's case, Russ. & Ry.* 444.

It must appear that the weapon was taken out with the intention of being unlawfully used. The defendant was indicted for being out at night for the purpose of taking game, armed with a bludgeon. It appeared that he had with him a thick stick, large enough to be called a bludgeon, but that he was in the constant habit of using it as a crutch, being lame. Taunton J. ruled that it was a question for the jury, whether he took out the stick with the intention of using it as an offensive weapon, or merely for the purpose to which he usually applied it. The defendant was acquitted. *Palmer's case*, 1 *Moody & Rob.* 70. A walking-stick of ordinary size was ruled to be "an offensive weapon," within the 7 G. 2. c. 21. *Johnson's case, Russ. & Ry.* 492.

ASSAULT UPON PERSONS APPREHENDING OFFENDERS.

By 9 Geo. 4. c. 69, s. 2, it is enacted, that where any person shall be found upon any land, committing any such offence as is thereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons thereinbefore mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made

in any other place to which he may have escaped therefrom, and to deliver him as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace. And in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person thereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

On an indictment under this statute, the prosecutor must prove, 1st, that the defendant was found upon some land committing one of the offences specified in the 9 G. 4. c. 69, *vide supra*; 2d, that he is himself either the owner or occupier of the land, or person having a right of free warren or free chase, or land of the manor, or gamekeeper, or servant of any of the above named persons, or a person assisting such gamekeeper or servant; 3d, the assaulting or offering violence, with a gun, &c. at the time of the attempted apprehension.

GAMING.

Where an offence at common law . . . 447
Statute 9 *Anne, c.* 14 448
Proof of the game . . . 448
Proof of the winning at one time or sitting . 449
Statute 18 *Geo.* 2. *c.* 34. 449

When an offence at common law.] Gaming, says Hawkins, is permitted in England, upon every possible subject, excepting where it is accompanied by circumstances repugnant to morality or public policy, or where, in certain special cases, it is restrained

by positive statutes. *Hawk. P. C. b.* 1. *c.* 92. *s.* 1. But where the playing is, from the magnitude of the stake, excessive, and such as is now commonly understood by the term "gaming," it is considered by the law as an offence, being in its consequences most mischievous to society. 1 *Russell*, 406. The principal statutory provisions against gaming are those contained in the 9 Anne, c. 14. s. 5, and the 18 Geo. 3. c. 34. s. 8.

Statute 9 *Anne, c.* 14.] By 9 Anne, c. 14. s. 5, it is enacted, that if any person or persons whatsoever, at any time or times after the said first day of May, 1711, do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, (i. e. cards, dice, tables, or other games whatever,) or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any one time or sitting, win of any one or more person or persons whatsoever, above the sum or value of 10*l.*; that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of 10*l.* and being convicted of any of the said offences upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment, as in cases of wilful perjury; and such penalty to be recovered by such person or persons as shall sue for the same, by such action as aforesaid.

Upon an indictment under this statute, the prosecutor must prove, 1st, the playing at or with cards, or dice, or at any of the games previously mentioned, or bearing a share or part in the stakes, &c., or the betting on the sides of the players; 2d, the winning, obtaining, or acquiring; 3d, of some sum of money or other valuable thing; and 4th, that this was done by fraud, shift, &c.

Proof of the game.] A horse race above 10*l.* is within the statute. *Goodburn v. Marley*, 2 *Str.* 1159. Although for a legal plate. *Blaxton v. Pye*, 2 *Wils.* 309. So a foot race. *Lynall v. Longbothom*, 2 *Wils.* 36. So also, as it seems, a wager on a game at cricket. *Jeffreys v. Walter*, 1 *Wils.* 220. Indeed, Abbott C. J. was of opinion, that the statute applied to all games, whether of skill, or chance, and that it was the playing for money which made them unlawful. *Sigel v. Jebb*, 3 *Stark. N. P. C.* 1.

Proof of the winning at one time or sitting.] The statute makes the winning of 10*l.* at one time or sitting, a nullity. To lose 10*l.* at one *time*, is to lose it by a single stake or bet; to lose it at one *sitting*, is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time. The statute 18 G. 2. c. 34, (a law made in *pari materiâ*,) may serve to explain this. To lose 10*l.* at any one time, or 20*l.* within twenty-four hours, is equally penal by that statute. *Per Blackstone J., Bones v. Booth*, 2 *W. Bl.* 1226. Where the playing continued from Monday evening to Tuesday evening, without any intermission, except an hour or two for dinner, this was held to be *one sitting* within the statute. *Ibid.* The defendant may be convicted of winning a less sum than that stated in the declaration. *Hill's case*, 1 *Stark. N. P. C.* 359.

Statute 18 *Geo.* 2. *c.* 34.] By 18 Geo. 2. c. 34. s. 8, it is enacted, that if any person, after the commencement of that act, shall win or lose at play, or, by betting, at any one time, the sum or value of 10*l.*, or within the space of twenty-four hours, the sum or value of 20*l.*, such person shall be liable to be indicted for such offence, within six months after it is committed, either before his Majesty's justices of the King's Bench, assize, gaol delivery, or grand sessions, and being thereof convicted, shall be fined five times the value of the sum so won or lost; which fine, (after such charges as the Court shall judge reasonable allowed to the prosecutors, and evidence out of the same,) shall go to the poor of the parish or place where such offence shall be committed.

HIGHWAYS.

Nuisances to highways 450
Proof of the way being a highway . . . 450
Proof of the highway as set forth . . . 451
With regard to the termini . . . 452
Proof of changing 453
Proof of the nuisance—what will amount to . . 453
Whether justifiable from necessity . . 455

Not repairing highways 455
Proof of liability to repair . . . 456
Parish 456
Inclosure 458
Particular districts and persons by prescription 458
Corporations 460
Private individuals 460
Proofs in defence 461
Parish 461
Districts, or private individuals . . 462
Competency of witnesses 462

NUISANCES TO HIGHWAYS.

Upon prosecutions for nuisances to a highway, the prosecutor must prove, 1st, that the way in question is a common highway; 2d, the obstructing of it, or other nuisance.

Proof of the way being a highway.] Every way which is common to the public is a highway. Thus a bridge may be a common highway. 2 *Ld. Raym.* 1174. So a footway, *Logan v. Burton*, 5 *B. & C.* 513, for it is a public highway for foot passengers. *Allen v. Ormond*, 8 *East*, 4. So a public bridle-way. *R. v. Inhab. of Salop*, 13 *East*, 95. So a towing-path, used only by horses employed in towing vessels, is a highway for that purpose. *Per Bayley, J. R. v. Severn and Wye Railway Co.* 2 *B. & A.* 648. And a railway made under the authority of an act of parliament, which provides that the public shall have the beneficial enjoyment of it, is also a highway, to be used in a particular manner. *R. v. Severn and Wye Railway Co.* 2 *B. & A.* 646.

A river which is common to all the King's subjects, has been frequently held to be a highway; and if its course change, the highway is diverted into the new channel. 1 *Rol. Ab.* 390. *Hammond's case*, 10 *Mod.* 382. *Hawk. P. C. b.* 1. *c.* 76. *s.* 1.

It must appear that the highway was a way common to all the King's subjects; for, though numerous persons may be entitled to use it, yet, if it be not common to all, it is not a public highway. Thus a private way, set out by commissioners under an inclosure act, for the use of the inhabitants of nine parishes, and directed to be repaired by them, does not concern the public, nor is of a public nature, but merely concerns the individuals who have a right to use it. *Richards's case*, 8 *T. R.* 634.

In general the proof of any particular way being a highway, is from the use of it by the public as such for such a number

of years, as to afford evidence of a dedication by the owner of the soil to the public. The particular manner in which it has been used, says Mr. Starkie, as where it has been used for some public purpose, as conveying materials for the repairs of other highways; (*R. v. Wandsworth*, 1 *B. & Ald.* 63.) or upon any occasion likely to attract notice, is very material; for such instances of user would naturally awaken the jealousy and opposition of any private owner, who was interested in preventing the acquisition of any right by the public; and consequently, acquiescence affords a stronger presumption of right, than that which results from possession and user in ordinary cases. 2 *Stark. Ev.* 380. 2*d ed.* A road may be dedicated to the public for a certain time only, as by the provisions of an act of parliament, and upon the expiring or repeal of the act, its character as a public highway will cease. *Mellor's case*, 1 *B. & Adol.* 32. Where commissioners for setting out roads have exceeded their authority, in directing that certain private roads which they set out shall be repaired by the township, if the public use such roads, it is a question for the jury whether they have not been dedicated to the public. *Wright's case*, 3 *B. & Adol.* 681. In the same case Lord Tenterden held, that when a road runs through a space of 50 or 60 feet, between inclosures set out by act of parliament, it is to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road. *Ibid.*

Unless there be some one who was capable of dedicating the soil to the public, it seems that a use of it as a highway by them, and repairs done by the parish, under a mistaken idea of their liability, will not create such liability, though it would be otherwise if the repairs were done with a full knowledge of the facts, and with an intention of taking upon themselves the burthen. *R. v. Edmonton*, 1 *Moo. & Rob.* 24. Trustees, in whom land is vested for public purposes, may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. *R. v. Leake*, 5 *B. & Adol.* 469, 2 *Nev. & M.* 583.

According to the opinions of some persons, a way was only a highway when it led directly from a market town, or from town to town. *Hawk. P. C. b.* 1. c. 76. s. 1. It is said by Lord Hale, that if a way lead to a market, and is a way for all travellers, *and communicates with a great road*, it is a highway; but if it lead only to a church, or to a private house, or to a village, then it is a private way; but it is a matter of fact, and much depends upon common reputation. *Austin's case*, 1 *Vent.* 189. But it is now held to be sufficient if the way in question communicates at its *termini* with other highways. Thus on an indictment for obstructing a passage, which led from one part of a street, by a circuitous route, to another part of the same street, and which

had been open to the public as far back as could be remembered, Lord Ellenborough held this to be a highway; though it was not in general of use to those walking up and down the street, but was only of convenience when the street was blocked up with a crowd. *Lloyd's case*, 1 *Campb.* 260.

Whether a street which is not *a thoroughfare* can be deemed a highway, has been the subject of considerable discussion. In the case last cited, Lord Ellenborough said, "I think that, if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say that this right cannot exist, because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in Queen's-square) there is no thoroughfare." The same doctrine was recognized by Lord Kenyon, in the case of *the Rugby Charity v. Merryweather*, 11 *East*, 375. (*n.*), where he says "As to this not being a thoroughfare, that can make no difference. If it were otherwise, in such a great town as this, it would be a trap to make persons trespassers." The opinions of Lord Kenyon and Lord Ellenborough on this point have, however, been questioned. In *Woodyer v. Hadden*, 5 *Taunt.* 125, the Court expressed their dissatisfaction with the *dictum* of Lord Kenyon, in the *Rugby case*; and in *Wood v. Veal*, 5 *B. & A.* 454, Abbott, C. J., after referring to that case, said, "I have great difficulty in conceiving that there can be a public highway, which is not a thoroughfare, because the public at large cannot be in the use of it;" and similar doubts were expressed by Holroyd and Best, Js. It may, perhaps, be questioned, whether the reason given by the Chief Justice in the latter case is a satisfactory one. In many instances, as in that of Queen's-square, mentioned by Lord Ellenborough, the public at large have the use of it, as forming an approach to the houses built around the square. In such cases the proper question seems to be not whether the place is a thoroughfare, but whether it is in fact useful to the public.

Proof of the highway as set forth.] The highway in question must be proved as set forth in the indictment; but if the description be too general and indefinite, advantage must be taken of that defect by plea in abatement, and not under the general issue. *R. v. Hammersmith*, 1 *Stark. N. P. C.* 357. A material variance between the description in the indictment and the evidence will be fatal; as where a highway leading from A. to B., and communicating with C. by a cross road, is described as a highway leading from A. to C., and from thence to B. *R. v. Great Canfield*, 6 *Esp.* 136. Where the way was stated to be "for all the liege subjects, &c., to go, &c., with their horses, coaches, carts, and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no

variance. *R. v. Lyon, Ry. & Moo. N. P. C.* 151. So where the way is stated to be a pack and prime way, and appears to be a carriage way, the variance is fatal. *R. v. Inhab. of St. Weonard's*, 6 *C. & P.* 582.

Proof of the highway as set forth—with regard to the termini.] Although it is unnecessary to state the *termini* of the highway, yet, if stated, they must be proved as laid. *R. v. Upton-on-Severn*, 6 *C. & P.* 133.

Proof of—changing.] An ancient highway cannot be changed without the King's license first obtained, upon a writ of *ad quod damnum* and inquisition thereon found, that such a change will not be prejudicial to the public; but it is said that the inhabitants are not bound to watch such new way, or to make amends for a robbery committed therein, or to repair it. 1 *Hawk. P. C. b.* 1. *c.* 76. *s.* 3. A private act of parliament for inclosing lands, and vesting a power in commissioners to set out a new road, is equally strong, as to these consequences, with the writ of *ad quod damnum*. 1 *Burr.* 465. An owner of land, over which there is an open road, may inclose it of his own authority; but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. *Ibid.*

The power of widening and changing highways is given to justices of the peace, by the statutes 13 Geo. 3. c. 78, and 55 Geo. 3. c. 68.

A statute giving authority to make a new course for a navigable river, along which there is a towing-path, will not take away the right of the public to use that path, without express words for that purpose. *Tippett's case*, 1 *Russell*, 316.

Proof of the nuisance—what acts amount to.] There is no doubt but that all injuries whatever to any highway, as by digging a ditch, or making a hedge across it, or laying logs of timber on it, or doing any act which will render it less commodious to the public, are nuisances at common law; and it is no excuse that the logs are only laid here and there, so that people may have a passage by winding and turning through them. *Hawk. P. C. b.* 1. *c.* 76. *s.* 144, 145. So erecting a gate across a highway is a nuisance; for it not only interrupts the public in their free and open passage, but it may in time become evidence in favour of the owner of the soil. *Id. c.* 75. *s.* 9. It is also a nuisance to suffer the ditches adjoining a highway to be foul, by reason of which the way is impaired; or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as to incommode the passage. *Id. c.* 76. *s.* 147; and see 13 G. 3. c. 78. Where a waggoner occupied one side of a public street, in a city before

his warehouses, in loading and unloading his waggons, for several hours at a time, by night and by day, having one waggon at least usually standing before his warehouses, so that no waggon could pass on that side of the street; this was held to be a nuisance, although there was room for two carriages to pass on the opposite side. *Russell's case*, 6 *East*, 427. So keeping coaches at a stand in a street, plying for passengers, is a nuisance. *Cross's case*, 3 *Campb.* 226. Ploughing up a foot-path is a nuisance, *Griesley's case*, 1 *Vent.* 4, *Wellbeloved on Highways*, 443, both on the ground of inconvenience to the public, and of injuring the evidence of their title.

The obstruction of a navigable river is likewise a public nuisance; as by diverting part of the water whereby the current is weakened, and made unable to carry vessels of the same burthen as before. *Hawk. P. C. b.* 1. *c.* 75. *s.* 11. But if a vessel sink by accident in a navigable river, the owner is not indictable as for a nuisance in not removing it. *Watt's case*, 2 *Esp.* 675. And where a staith was erected stretching into the river Tyne, and used in shipping coals, whereby the public had a better and cheaper supply of that article, it was held to be no nuisance, *diss.* Lord Tenterden. *Russell's case*, 6 *B. & C.* 566, 9 *D. & R.* 566. In this case it was said, by Mr. Justice Bayley, in his summing up to the jury, that where a great public benefit accrues, from that which occasions the abridgment of the right of passage, that abridgment is not a nuisance, but proper and beneficial; and he directed the jury to find a verdict for the defendants, if they thought the abridgment of the right of passage was for a public purpose, and produced a public benefit, and if it was in a reasonable situation, and if a reasonable space was left for the passage of vessels navigating the river Tyne. On a motion for a new trial, the Court of King's Bench, with the exception of Lord Tenterden, held this direction right. Lord Tenterden said, "Admitting there was some public benefit both from the price and the condition of the coals, still I must own that I do not think those points could be properly taken into consideration, in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of vessels on the public navigable river was injured by these erections." Where the lessee of the Corporation of London, the conservators of the river Thames, erected a wharf between high and low water-mark, extending for a considerable space along the river, upon an indictment for a nuisance, it was contended that, as claiming under the corporation, the party had a right to make the wharf. But Abbott, C. J., said, "Will you contend that you have a right to narrow the river Thames, so long as you have space sufficient for the purposes of navigation?" The argument that the wharf was a public benefit, was then advanced; but the Chief Justice said,

"Much evidence has been adduced on the part of the defendant, for the purpose of showing that the alteration affords greater facility and convenience for loading and unloading; but the question is not whether any private advantage has resulted from the alterations to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration." *Lord Grosvenor's case*, 2 *Stark. N. P. C.* 511.

Proof of the nuisance—whether justifiable from necessity.] It not unfrequently becomes a question, whether the obstruction complained of is justifiable by reason of the necessity of the case, as when it occurs in the usual and necessary course of the party's lawful business. The defendant, a timber-merchant, occupied a small timber-yard close to the street; and, from the smallness of his premises, he was obliged to deposit the long pieces of timber in the street, and to have them sawed up there before they could be carried into the yard. It was argued that this was necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican. But Lord Ellenborough said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises, by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." *Jones's case*, 3 *Camph.* 230. So although a person who is rebuilding a house is justified in erecting a *hoard* in the street, which serves as a protection to the public, yet, if it encroach unnecessarily upon the highway, it is a nuisance. *See Bush v. Steinman*, 1 *Bos. & Pul.* 407. *Russell's case*, 6 *East*, 427, *ante*, *p.* 454.

NOT REPAIRING HIGHWAYS.

Upon an indictment for not repairing a highway, to which the general issue is pleaded, the prosecutor must prove, 1st, that the way in question is a public highway, (*vide ante*, *p.* 450, *et seq.*) and that it agrees with the description of the way in the indictment, (*ante*, *p.* 452;) 2dly, that it is within the pa-

rish, or other district charged; 3dly, that it is out of repair; and, 4thly, where the charge is not upon the parish, but against common right, as upon an individual *ratione tenuræ*, the liability of the party to make the repairs.

Proof of liability to repair—parish.] Parishes of common right are bound to repair their highways, and by prescription one parish may be bound to repair the way in another parish. *Per Holt C. J., R. v. Ragley*, 12 *Mod.* 409, *Hawk. P. C. b.* 1. *c.* 76. No agreement with any person whatever can take off this charge. 1 *Ventr.* 90. The parish generally, and not the overseers, are liable; and an indictment against the latter was quashed. *Dixon's case*, 12 *Mod.* 198. If particular persons are made liable by statute to repair, and become insolvent, the parish again becomes liable. 1 *Ld. Raym.* 725. And where a township, which has been accustomed to repair its own ways, is exempted by act of parliament from the repair of a certain road, the liability reverts to the parish. *R. v. Sheffield*, 2 *T. R.* 106. The parish will remain liable, though the duty of repairing may likewise be imposed upon others. Thus where a statute enacted, that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; and that the parish was under the obligation, in the first instance, of seeing that the street was properly repaired, and might seek a remedy over against the commissioners. *R. v. St. George, Hanover Square*, 3 *Campb.* 222. So where the trustees of a turnpike-road are required by statute to make the repairs, the parish, or other district, is not exonerated, but is liable to be indicted. In such cases, the tolls, granted by the act, are only an auxiliary and subordinate fund, and the persons whom the public have a right to look to, are the inhabitants of the district, who may apply for relief under the 32d section of the General Turnpike Act. *R. v. Netherthong*, 2 *B. & A.* 179; *see also R. v. Oxfordshire*, 4 *B. & C.* 194. Nor can other parties render themselves liable to an indictment for not repairing by *agreement*. Thus an indictment against the corporation of Liverpool, stating that they were liable to repair a certain highway, by reason of an agreement with the owners of houses alongside of it, was held bad, because the inhabitants of the parish, who are *primâ facie* bound to the repair of all ways within their boundaries, cannot be discharged from their liability by an agreement with others. *R. v. Mayor, &c. of Liverpool*, 3 *East*, 86.

If the repairs are done by a parishioner, under an agreement with the parish, in consideration of his being excused his statute-

duty, that is virtually a repair by the parish. *Per Ld. Ellenborough, R. v. Wandsworth*, 1 *B. & Ald.* 66.

When, by act of parliament, trustees are authorised to make a road from one point to another, the making of the entire road is a condition precedent to any part of it becoming a highway repairable by the public. An indictment charged a township with the non-repair of a highway; and it appeared in evidence, that the road in question was begun six years before, under a local turnpike act; that the trustees had finished it all but about 300 yards at one end of the line, and one mile at the other, (both out of the township;) fenced what they had made, put up two turnpike-gates, and taken toll; that the road was convenient, much used by the public, and leading at each end into old, open, and public highways; but it was held by Hullock B. that the indictment was premature, the trustees not having finished their road according to the act of parliament, and consequently that it was no public highway. *R. v. Hepworth, cited* 3 *B. & Adol.* 110, *Lewin, C. C.* 160. So where trustees, empowered by act of parliament to make a road from A. to B. (being in length twelve miles,) completed eleven miles and a half of such road, to a point where it intersected a public highway, it was held that the district, in which the part so completed lay, was not bound to repair it. *R. v. Cumberworth*, 3 *B. & Adol.* 108; *and see R. v. Paddington Vestry*, 9 *B. & C.* 460.

It was for some time a matter of doubt whether, where an individual dedicated a way to the public, and the public used such way, the parish, in which it was situated, was bound to repair it, without any adoption of it on their part. In the case of *R. v. St. Benedict*, 4 *B. & Ald.* 450, an opinion was expressed by Bayley J. that the parish was not liable; but this doctrine was denied in a late case, and it was held that no distinct act of adoption was necessary, in order to make a parish liable to repair a public road; but that, if the road is public, the parish is of common right bound to repair it. *R. v. Leake*, 5 *B. & Adol.* 469, 2 *Nev. & M.* 583.

Where a parish is situated partly in one county and partly in another, and a highway, lying in one of those parts, is out of repair, the indictment must be against the whole parish, and must be preferred in that county in which the ruinous part lies. *R. v. Clifton*, 5 *T. R.* 498. By statute 34 G. 3. c. 64, justices of the peace are authorised to allot the highway, in such case, between the two parishes; and the parish, to whom the portion is allotted, shall be bound to repair it, and shall be liable to be indicted for the neglect of such duty. It is provided, that the act shall not extend to highways repairable by bodies corporate, townships, &c. or by a private person.

Where a question arises as to the road being within the boundaries of the parish, it is sometimes necessary to prove those

boundaries, by giving in evidence the award of commissioners appointed to set them out. In such case, it must be shown that the award of the commissioners pursues their authority. By an inclosure act, commissioners were directed to fix the boundaries of a parish, and to advertise in a provincial newspaper such boundaries. The boundaries were also to be inserted in the award of the commissioners, and to be conclusive. The boundaries in the award varying from those in the newspaper, it was held that the commissioners had not pursued their authority, and that the award was not binding as to the boundaries of the parish. *R. v. Washbrook*, 4 *B. & C.* 732. By a similar act, commissioners had power to settle the boundaries of certain parishes, upon giving certain previous notices to the parishes to be affected by the award. The highway in question never having been repaired by the parish to which it was allotted, the judge refused to admit the award in evidence, until the requisite notices were proved to have been given; and upon an application for a new trial, it was refused. *R. v. Haslingfield*, 2 *M. & S.* 558. Where two parishes are separated by a river, the *medium filum* is the boundary. *R. v. Landulph*, 1 *Moo. & R.* 393.

Where a highway crosses the bed of a river which washes over it and leaves a deposit of mud, it seems the parish is not bound to repair that part. *Ibid.*

Proof of liability to repair—inclosure.] Where the owner of lands not inclosed, next adjoining to a highway, incloses his lands on both sides the way, he is bound to make the road a *perfect good way*, and shall not be excused by making it as good as it was before the inclosure, if it were then defective; because, before the inclosure, the public used, where the road was bad, to go, for their better passage, over the fields adjoining, which liberty is taken away. And if the owner inclose one side only, he is bound to repair the whole, if there be an ancient inclosure on the other side; but if there be not such an ancient inclosure, he is bound only to repair half; and upon laying open the inclosure, he is freed, as it seems, altogether from the liability to repair. *Hawk. P. C. b.* 1. *c.* 76. *s.* 6, 7, 8. 3 *Bac. Ab. Highways, (F.)* 1 *Russell*, 325. *Welbeloved on Highways*, 90. 2 *Wm. Saund.* 160. *(a) n.* (12.) *Woolrych on Ways*, 80.

But where a highway is inclosed under the directions of an act of parliament for dividing and inclosing common fields, the party inclosing the way is not bound to repair. *R. v. Flecknow*, 1 *Burr.* 461. And so also with regard to a road made in pursuance of a writ of *ad quod damnum*. *Exparte Venner*, 3 *Atk.* 772. *Hawk. P. C. b.* 1. *c.* 76. *s.* 7.

Proof of liability to repair—particular districts and persons by prescription.] Although *primâ facie* the parish is bound to repair all the ways within its boundaries, yet other bodies or indi-

viduals may be liable to such repairs, to the exoneration of the parish. Thus a township, or other particular district, may, by custom, be liable to repair; and it is sufficient to state in the indictment, that the township has been used and accustomed to repair, and of right ought to repair. *R. v. Ecclesfield*, 1 *B. & A.* 348. *R. v. West Riding of Yorkshire*, 4 *B. & A.* 623. Where it appears that a township has been used immemorially to repair all roads within it, such township is placed, as to repairs, in the same situation as a parish, and cannot discharge itself from its liability without showing that some other persons, in certainty, are liable to the repairs. *R. v. Hatfield*, 4 *B. & A.* 75. Where a new way is made within the limits of the township, and which, had the parish been bound to repair, must have been repaired by the parish, such way must be repaired by the township. *R. v. Ecclesfield*, 1 *B. & A.* 348. *R. v. Netherthong*, 2 *B. & A.* 179. It appears that the liability of a township, or other district, has its origin in *custom* rather than in *prescription*; a prescription being alleged in the person, a custom in the land or place; and the obligation to repair is of a local, and not of a personal nature. *R. v. Ecclesfield*, 1 *B. & A.* 348. So it is said by Bayley J., that a parish cannot be bound by prescription; for individuals in a parish cannot bind their successors. *R. v. St. Giles, Cambridge*, 5 *M. & S.* 260. The inhabitants of a township, or other district, cannot be charged to repair *ratione tenuræ*; for unincorporated inhabitants cannot, as inhabitants, hold lands. *R. v. Machynlleth*, 2 *B. & C.* 166.

Upon an appeal against the appointment of a surveyor of the highways for the township of K. N., the sessions found that the parish of M. consisted of two townships; that surveyors had been appointed for each; but latterly, to save expense, there had been two surveyors appointed for the parish at large. They likewise found that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of the highways in each; that the surveyors kept distinct accounts, (which were examined by the general vestry,) and that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate. Lord Tenterden said, that if there had been an indictment against either township, and an allegation that each township had immemorially repaired the roads within it, these facts would be sufficient evidence to support the averment. *R. v. Kings Newton*, 1 *B. & Ad.* 826.

It seems that the inhabitants of a district, not included within any parish, cannot be bound to repair the highways within such district. This point arose, but was not decided in the case of *R. v. Kingsmoor*, 2 *B. & C.* 190, which was an indictment against an extra-parochial hamlet. The court held that it should have been shown on the face of the indictment that the

hamlet neither formed part of, nor was connected with, any other larger district, the inhabitants of which were liable to repair the road in question. Upon this point, the judgment for the crown was reversed; but Best J. observed, "I can find no authority for saying that any thing but a parish can be charged. If the law authorises no charge except upon parishes, places that are extra-parochial are not, by the general rule of law, liable." See the observations on this case in *Welbeloved on Highways*, 81.

Proof of liability to repair—corporations.] A corporation, sole or aggregate, may be bound by prescription or usage to repair a highway, without showing that it is in respect either of tenure or of any other consideration. *Hawk. P. C. b.* 1. *c.* 76. *s.* 8. *R. v. St. Giles, Cambridge*, 5 *M. & S.* 260.

Proof of liability to repair—private individuals.] A private individual cannot be bound to repair a highway, except in respect of some consideration, and not merely by a general prescription; because no one, it is said, is bound to do what his ancestors have done, except for some special reason, as the having land descending from such ancestors, which are held by such service, &c. *Hawk. P. C. b.* 1. *c.* 76. *s.* 8. *Austin's case*, 1 *Ventr.* 189. 13 *Rep.* 33. *R. v. St. Giles, Cambridge*, 5 *M. & S.* 260. Yet an indictment, charging a tenant in fee simple with being liable to repair, by *reason of the tenure of his land*, is sufficiently certain, without adding that his ancestors, whose estate he has, have always so done, which is implied in the above allegation. *Hawk. P. C. b.* 1. *c.* 76. *s.* 8. In order to exempt a parish, by showing that a private person is bound to repair, it must be shown that the burthen is cast upon such other person under an obligation equally durable with that which would have bound the parish, and which obligation must arise in respect of some consideration of a nature as durable as the burthen. *Per Lord Ellenborough, R. v. St. Giles, Cambridge*, 5 *M. & S.* 260. Where lands, chargeable with the repairs of a bridge or highway, are conveyed to different persons, each of such persons is liable to the charge of all the repairs, and may have contribution from the others; for the law will not suffer the owner to apportion the charge, and thus to render the remedy for the public more difficult. Therefore, where a manor, thus charged, was conveyed to several persons, it was held that a tenant of any parcel, either of the demesnes, or of the services, was liable to the whole repairs. And the grantees are chargeable with the repairs, though the grantor should convey the lands discharged from the burthen, in which case, the grantee has his remedy over against the grantor. *Reg. v. Duchess of Buccleugh*, 1 *Salk.* 358. *R. v. Buckeridge*, 4 *Mod.* 48. 2 *Saund.* 159, (*n.*) 1 *Russell*, 325.

Repairing a highway for a length of time will be evidence of

a liability to repair *ratione tenuræ*. Thus, if a person charged as being bound to repair *ratione tenuræ*, pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant twenty-five years since the removal of the alleged encroachment, that is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show the time when the encroachment was made. *Skinner's case*, 5 *Esp.* 219, 1 *Russell*, 326. In determining whether the act of repairing a way is evidence to prove a liability to repair *ratione tenuræ*, the nature of the repairs must be regarded. Thus, it is said by Hullock B., that an adjoining occupier occasionally doing repairs for his own convenience to go and come, is no more like that sort of repair which makes a man liable *ratione tenuræ*, than the repair by an individual of a road close to his door, is to the repair of the road outside his gate. *Allanson's case, Lewin, C. C.* 158.

Proof for the defence—parish.] Upon an indictment against a parish for not repairing, the defendants may show under the plea of not guilty, either that the way in question is not a highway, or that it does not lie within the parish, or that it is not out of repair, for all these are facts which the prosecutor must allege in the indictment, and prove under the plea of not guilty. 2 *Saund.* 158, (*n.*) 3. 1 *Russell*, 331. But where a parish seeks to discharge itself from its liability, by imposing the burthen of repair upon others, this defence must be specially pleaded, and cannot be given in evidence under the general issue. In such special plea, the parish must show with certainty who is liable to the repairs. *R. v. St. Andrews*, 1 *Mod.* 112, 3 *Salk.* 183, 1 *Ventr.* 256, *R. v. Hornsey, Carth.* 212, *Fort.* 254, *Hawk. P. C. b.* 1. *c.* 76. *s.* 9. But where the burthen of repairs was transferred from the parish by act of parliament, Lord Ellenborough held that this might be shown under a plea of not guilty. *R. v. St. George*, 3 *Campb.* 222. Where the parish pleads specially that others are bound to repair, the plea admits the way to be a highway, and the defendants cannot under such plea give evidence that it is not a highway. *R. v. Brown*, 11 *Mod.* 273.

In order to prove the liability of a parish to repair, when denied under a special plea, the prosecutor may give in evidence a conviction obtained against the same parish upon another indictment for not repairing, and whether such judgment was after verdict or by default, it will be conclusive evidence of the liability of the whole parish to repair. *R. v. St. Pancras, Peake*, 219. But *fraud* will be an answer to such evidence. *Ibid.* A record of *acquittal* is not admissible as evidence of the non-liability of the parish acquitted. *Ibid.*

But where an indictment has been preferred against a parish consisting of several townships, and a conviction has been obtained, but it appears that the defence was made and conducted entirely by the district in which the way lay, without the privity or consent of the other districts, the indictment will be considered as in substance an indictment against that district only, and the others will be permitted to plead the prescription to a subsequent indictment for not repairing the highways in that parish. 2 *Saund.* 159. *c.* (*n.*) *R. v. Townsend*, *Doug.* 421. On an indictment for not repairing, against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, where there was a plea on the part of the township of Burton, that each of the three townships had immemorially repaired its own highways separately, it was held that the records of indictments against the parish generally, for not repairing highways situate in the township of Eardisland, and the township of Hardwicke, with general pleas of not guilty, and convictions thereupon were *primâ facie* evidence to disprove the custom for each township to repair separately, but that evidence was admissible to show that these pleas of not guilty were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton. *R. v. Eardisland*, 2 *Campb.* 494.

Proof for the defence—district or private individual.] Where a particular district, not being a parish, or where a private individual by reason of tenure, is indicted for not repairing a highway, as the prosecutor is bound to prove the special ground of their liability, *viz.* custom, or tenure, under the plea of not guilty, so the defendants are at liberty under that plea to show that no such special grounds exist. In such case, it is not necessary for the defendants after disproving their own liability to go further, and prove the liability of others. But if, as in the case of a parish, they choose, though unnecessarily, to plead the special matter, it has been held that it is not sufficient to traverse their own liability, but that they must show in particular who is bound to repair. *R. v. Yarton*, 1 *Sid.* 140. *R. v. Hornsey*, *Carth.* 213. 2 *Saund.* 159, *a.* (*n.*) 1. 1 *Russell*, 332. Where charged *ratione tenuræ*, the defendant may show that the tenure originated within the time of memory. *Hayman's case*, *M. & M.* 401.

Competency of witnesses.] The prosecutor of an indictment against a parish for not repairing, is a competent witness to support the indictment. *R. v. Hammersmith*, 1 *Stark.* 357, 1 *Russell*, 334. And inhabitants of the parish are also competent for the prosecution, since they are speaking against their own interest, in subjecting themselves to the

charge. *Hayman's case*, *M. & M.* 401. So the general highway act, 13 G. 3. c. 78. s. 68, enacts, that the surveyor of any parish or place shall be deemed a competent witness on all matters relative to the execution of the act, notwithstanding his salary may arise in part from the forfeitures and penalties thereby inflicted; and the same statute (s. 76,) enacts, that any inhabitant of any parish or place in which any offence shall be committed contrary to the act, shall be deemed a competent witness.

But upon indictments charging individuals with the repairs, inhabitants of the parish in which the lands lie, are not competent witnesses for the prosecution. Thus, upon an information against the defendant for not repairing the highway between Stratford and Bow, none of the persons who lived in either of these parishes were allowed to give evidence for the prosecution. *R. v. Buckeridge*, 4 *Mod.* 48.

The inhabitants of a parish are not competent witnesses for the defendants, for they are themselves in effect defendants in the proceeding. 1 *B. & A.* 66, *ante*, *p.* 111. Nor are they made competent by the 54 G. 3. c. 170. *Ovenden v. Palmer*, 2 *B. & Adol.* 236. *R. v. Bishop Auckland*, 1 *Moo. & R.* 286. And upon a plea by the inhabitants of a parish, that one R. was bound to repair the road in question *ratione tenuræ*, a mere inhabitant, not occupying any land within the parish, was held by Lord Kenyon to be incompetent to support the plea, because every inhabitant is liable to do statute duty, and also, because in the event of a verdict against the defendants, the witness would be liable to contribute towards the payment of the fine. *R. v. Wheaton Aston*, *Stark. on Ev. part* iv. *p.* 780, 1*st ed. ante*, *p.* 111. *See also R. v. Wandsworth*, 1 *B. & A.* 66. Upon an indictment against a parish for not repairing, Bayley J. held that a rated inhabitant of another parish, in which it was contended by the defendant, that the highway in question lay, was an incompetent witness to disprove that fact. *Anon. cited* 15 *East*, 474. But upon an indictment charging the inhabitants of the township of P. with a liability to repair all roads within their township, it was held that an inhabitant of an adjoining township, within the same parish, was a competent witness to prove that the place in question was a common highway, because though a conviction would discharge *the parish*, yet there would be this evidence to show that the road was public, whereby the latter township, from whence the witness came would be charged. *R. v. Pelling Appx. Stark. Ev. part* iv. *p.* 673, 1*st ed. vol.* 2. *p.* 385, 2*d ed.*

The inhabitant of a hundred also cannot be called to prove any fact in favour of the hundred, though so poor, as upon that account to be excused from the payment of taxes, "for though," says Chief Justice Parker, "poor at present, he may become rich." *R. v. Hornsey*, 10 *Mod.* 150. *Woolrych on Ways*, 265.

HOMICIDE.

Those homicides which are felonies, *viz.*, murder and manslaughter, will for the convenience of reference be treated of under separate heads; but as the shades between the various kinds of homicide, are in many cases very faint, and require the circumstances to be stated at large, it has been thought better to collect all the decisions under one head, *viz.*, that of murder, in order to avoid repetition, and to this part of the work, therefore, the reader is referred on the subject of homicide in general. It will be useful, however, in this place, to distinguish the nature of the different kind of homicide, not amounting to felony.

Homicides not felonious, may be divided into three classes, justifiable homicide, excusable homicide, and homicide by misadventure.

Justifiable homicide is where the killing is in consequence of an imperious duty prescribed by law, or is owing to some unavoidable necessity induced by the act of the party killed, without any manner of fault in the party killing. 1 *East, P. C.* 219, *Hawk. P. C. b.* 1. *c.* 28. *s.* 1, 22.

Excusable homicide is where the party killing is not altogether free from blame, but the necessity which renders it excusable, may be said to be partly induced by his own act. Formerly in this case, it was the practice for the jury to find the fact specially, and upon certifying the record into Chancery, a pardon issued of course under the statute of Gloucester, c. 9, and the forfeiture was thereby saved. But latterly it was usual for the jury to find the prisoner not guilty. 1 *East, P. C.* 220. And now by stat. 9 G. 4. c. 31. s. 10, no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in self-defence, or in any other manner without felony.

Homicide by misadventure is where a man doing a lawful act, without any intention of bodily harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues, must be lawful in itself, for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as (formerly) the shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head, are—1, where death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico*; and 3, from acts

lawful or indifferent in themselves, done with proper and ordinary caution. Homicide by *chance-medley* is, strictly, where death ensues from a combat between the parties upon a sudden quarrel; but it is frequently confounded with misadventure or accident. 1 *East, P. C.* 221.

KIDNAPPING.

Kidnapping, which is an aggravated species of false imprisonment, is the stealing and carrying away or secreting of any person, and is an offence at common law, punishable by fine and imprisonment. 1 *East, P. C.* 429. By the habeas corpus act, 31 Car. 2. c. 2. s. 12, the sending prisoners out of England, is made punishable as a *præmunire;* and by the 11 & 12 W. 3. c. 7, masters of vessels forcing their men on shore or leaving them behind, were subjected to three months imprisonment. This statute is repealed by the 9 G. 4. c. 31, by the 30th section of which it is enacted, that if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the Court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his majesty's attorney-general, in the Court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster in the county of Middlesex; and the said Court is thereby authorised to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such information.

LARCENY.

Definition, &c. 467
Proof of the lucri causâ . . . 468
Proof of the taking . . . 469
Proof of the manual taking . . . 469
Proof of the felonious intent in the taking . 471
Goods obtained by false process of law . 471
Goods taken by mistake . . . 471
Goods taken by trespass . . . 472
Goods taken under a fair claim of right . 473
Goods procured by finding . . 474
Goods taken by wife—or by wife and a stranger 476
Proof of the taking with reference to the possession of the goods 477
Original taking not felonious . . 477
Cases of bailees 478
Determination of the bailment . . 479
Cases of servants 481
Cases of lodgers 485
Stealing from the person . . . 486
Proof of the taking; distinction between larceny and false pretences—cases of larceny . . 487
No intent to part with the property by the prosecutor —original felonious intent on the part of the prisoner—cases of hiring horses, &c. larceny 488
Various cases amounting to larceny, where goods have been obtained by false pretences . 491
Cases of pretended purchases—larceny . . 493
Proof of the taking; distinction between larceny and false pretences—cases of false pretences . 495
Intent to part with the property by the prosecutor— original felonious intent on the part of the prisoner 495
Pretended purchases . . . 495
Cases of obtaining goods, &c. by false pretences . 497
Proof of the things stolen—things savouring of the realty at common law . . . 499

Things annexed to buildings, &c. . . 500
Mines 500
Trees, &c. 501
Written instruments . . . 503
Securities for money, &c. . . 504
Promissory notes . . . 506
Bankers checks . . . 507
Exchequer bills . . . 507
Goods from vessels . . . 508
Goods in the course of manufacture . . 509
Proof of the thing stolen—animals, &c.—domestic animals 509
Animals feræ naturæ . . . 509
Dead or reclaimed . . . 510
Animals kept for pleasure only, and not fit for food . 510
Dogs, pigeons, &c. . . . 511
Proof of the thing stolen . . . 512
Identity 512
Value 512
Proof of the ownership—cases where it is unnecessary to allege or prove ownership . . 512
Intermediate tortious taking . . . 512
Goods in custodiâ legis . . . 513
Goods of the offender himself . . . 513
Goods of joint-tenants and tenants in common . 514
Goods in possession of children . . 515
Goods in possession of bailees . . 515
In possession of carriers, drivers of stage coaches, &c. 516
Goods of deceased persons, executors, &c. . . 516
Goods of lodgers 517
Goods of married women . . . 517
Goods of persons unknown . . . 518
Goods of servants 518
Goods of corporations . . . 518
Goods belonging to counties, &c. . . 520
Goods for the use of poor of parishes . . 520
Goods of trustees of turnpikes . . 520
Goods of commissioners of sewers, &c. . . 521
Venue 521

Definition, &c.] Larceny has been defined to be "the wrongful or fraudulent taking and carrying away, by one person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 *East, P. C.* 553. 2 *Russell*, 93. *See the definitions collected, 1st Rep. on Crim. Law, p.* 9.

Larceny was formerly divided into grand larceny, where the value of the property was above twelve pence, and petty larceny where the value was twelve pence or under, but now by statute 8 & 9 G. 4. c. 29. s. 2, it is enacted, that the distinction between grand larceny and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in every respect, as grand larceny was, before the commencement of the act; and every court whose power as to the trial of larceny was, before the commencement of the act, limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment in the act after mentioned for simple larceny, and also to try all accessories to such larceny.

Proof of the lucri causâ.] | Larceny is defined by Eyre, B. to be "the wrongful taking of goods, with intent to spoil the owner of them, *lucri causâ*." *Pear's case*, 2 *East*, *P. C.* 685. And in the same manner Mr. Justice Blackstone says, that "the taking must be felonious, that is, done *animo furandi*, or as the civil law expresses it, *lucri causâ*." 4 *Com.* 232. The expression, *lucri causâ*, must not, as it seems, be understood to convey any further meaning, than that expressed in Mr. East's definition, "a felonious intent, to convert the goods to the taker's own use, and make them his own property," *vide supra*. It is not necessary that the offender should contemplate any thing in the nature of a pecuniary advantage. | Thus, in the following case, where the object was to destroy the property, the offence was still held to be larceny. The prisoner, in conjunction with the wife of a man, who was charged with stealing a horse, went to the stable of the owner, took the horse out, and backed it into a coal pit. It was objected for the prisoner, on an indictment for stealing the horse, that it was not taken *animo furandi*, and *lucri causâ*. The prisoner being convicted, the opinion of the judges was taken, who thought the conviction right. Six of the judges held it not to be essential to constitute the offence of larceny, that the taking should be *lucri causâ*. They thought that a taking fraudulently, with an intent wholly to deprive the owner of the property was sufficient; but some of the six thought, that in this case the object of protecting the party charged with stealing the horse might be deemed a benefit, or *lucri causâ*. Two of the judges held the conviction wrong. *Cabbage's case*, *Russ. & Ry.* 292. Upon this case it is observed in the report of the criminal law commissioners, (*p.* 17,) that where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief. In the following case, the *lucri causâ* appears not to have been considered as a necessary ingredient of larceny. The prisoners

were charged with stealing a quantity of beans. They were servants of the prosecutor, and took care of his horses, for which the prosecutor made an allowance of beans. The prisoners had entered the granary by a false key, and carried away a quantity of the beans which they gave to the prosecutor's horses. Bayley J. had directed an acquittal in a similar case; but Abbott J. being informed that several judges had, under the same circumstances, held the offence to be larceny, reserved the point. Eleven of the judges having met, eight were of opinion that it was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost the beans, or had them applied to the injury of his horses, but the men's labour was lessened, so that the *lucri causâ*, to give themselves ease, was an ingredient in the case. Three of the judges thought it no felony. *Morfit's case, Russ. & Ry.* 307.

The rule with regard to the *lucri causâ* is stated by the criminal law commissioners in the following terms. "The ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." 1*st Rep. p.* 17.

Proof of the taking.] The following is the definition of a felonious taking given by the criminal law commissioners. The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and where the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property against his will. 1*st Rep. p.* 16.

Where goods are once taken with a felonious intent, the offence cannot be purged by a restoration of them to the owner. Thus, the prisoner having robbed the prosecutor of a purse, returned it to him again, saying, If you value the purse take it, and give me the contents, but before the prosecutor could do this the prisoner was apprehended; the offence was held to be complete by the first taking. *Peat's case*, 2 *East, P. C.* 557.

Proof of the taking—what manual taking is required.] In order to constitute the offence of larceny, there must be an actual taking or severance of the thing from the possession of the owner, for as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be

guilty of a felony in carrying them away. Still though there must be a taking in fact from the actual or constructive possession of the owner, yet it need not be by the very hand of the party accused. For if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had taken them himself; as if one procure an infant, within the age of discretion, to steal the goods for him, or if, by fraud or perjury, he get possession of the goods by legal process without title. 2 *East, P. C.* 555. 2 *Russell*, 95.

The least removing of the thing taken, from the place where it was before, though it is not quite carried off, is a sufficient taking and carrying away to constitute larceny; and upon this ground a guest, who had taken the sheets from his bed with an intent to steal them, and carried them into the hall where he was apprehended, was adjudged guilty of larceny. *Hawk. P. C. b.* 1. *c.* 35. *s.* 25. 3 *Inst.* 108. 2 *East, P. C.* 555. 1 *Leach*, 323. So where a person takes a horse in a close, with intent to steal him, and is apprehended before he can get him out of the close. 3 *Inst.* 109. *See further as to Cattle, William's case*, 1 *Moody, C. C.* 107, *stated post.* The prisoner got into a waggon, and taking a parcel of goods which lay in the forepart, had removed it to near the tail of the waggon, when he was apprehended. The twelve judges were unanimously of opinion that, as the prisoner had removed the property from the spot where it was originally placed, with an intent to steal, it was a sufficient *taking* and *carrying away* to constitute the offence. *Coslet's case*, 1 *Leach*, 236, 2 *East, P. C.* 556. But where the prisoner had set up a parcel containing linen, which was lying lengthways in a waggon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken any thing, all the judges agreed that this was no larceny, although the intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them. *Cherry's case*, 2 *East, P. C.* 556, 1 *Leach*, 236, (*n.*) The following case, though nearly resembling the latter, is distinguished by the circumstance that every part of the property was removed. The prisoner sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and both holding it endeavoured to pull it out, but were prevented by the guard. The prisoner being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. *Walsh's case*, 1 *Moody, C. C.* 14. The prisoner was indicted for robbing the

prosecutrix of a diamond ear-ring. It appeared that as she was coming out of the opera-house, the prisoner snatched at her ear-ring, and tore it from her ear, which bled, and she was much hurt. The ear-ring fell into her hair, where it was found on her return home. On a case reserved, the judges were of opinion that this was a sufficient taking to constitute robbery; it being in the possession of the prisoner for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant that it was taken. *Lapier's case*, 2 *East*, *P. C.* 557, 1 *Leach*, 320.

There must, however, be a possession by the party charged, however temporary. The prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him. The prosecutor laid the bed down, but before the prisoner could take it up he was apprehended. The judges were of opinion that the offence was not completed. *Farrel's case*, 2 *East*, *P. C.* 557.

There must be a severance of the goods from the possession of the owner. The prisoner took a purse out of the pocket of the owner, but the purse being tied to a bunch of keys, and the keys remaining in his pocket, and the party being apprehended while they remained in his pocket, it was held no larceny, on the ground that the owner still remained in possession of his purse, and that there was no *asportavit*. *Wilkinson's case*, 1 *Hale*, *P. C.* 508. So where goods in a shop were tied to a string, which was fastened to one end of the bottom of the counter, and the prisoner took up the goods and carried them towards the door as far as the string would permit, and was then stopped, Eyre, B. ruled that there was no severance, and consequently no felony. *Anon. cited in Cherry's case*, 2 *East*, *P. C.* 556, 1 *Leach*, 321, (*n.*)

Proof of the felonious intent in the taking—goods obtained by false process of law.] Where the possession of goods is obtained from the owner by means of the fraudulent abuse of legal process, the offence will amount to larceny. Thus it is laid down by Lord Hale, that if A. has a design to steal the horse of B. and enters a plaint of replevin in the Sheriff's Court for the horse, and gets him delivered to him and rides him away, this is a taking and stealing, because done *in fraudem legis*. So where A. having a mind privately to get the goods of B. into his possession, brings an ejectment and obtains judgment against the casual ejector, and thereby gets into possession and takes the goods, if it be done *animo furandi*, it is larceny. 1 *Hale*, *P. C.* 507, 2 *East*, *P. C.* 660, 2 *Russell*, 130.

Proof of the felonious intent in the taking—mistake.] The proof that the goods were taken with a felonious intent may be rebutted, by showing that the party charged with the larceny

took them by mistake. Thus if the sheep of A. stray from his flock into that of B., and the latter by mistake drives them with his own flock, or shears them, that is not felony; but if he knows the sheep to be another's, and marks them with his own mark, that would be evidence of a felony. 1 *Hale, P. C.* 507. So if he appear desirous of concealing the property, or of preventing the inspection of it by the owner, or by any other who might make the discovery, or if, being asked, he deny the having them, although the knowledge be proved; these likewise are circumstances tending to show the felonious intent. 2 *East, P. C.* 661.

Proof of the felonious intent in the taking—goods taken by trespass.] Although the party may wrongfully take the goods, yet, unless he intended to assume the property in them, and to convert them to his own use, it will amount to a trespass only, and not to a felony. Thus if A. leaves his harrow in the field, and B. having land in the same field uses the harrow, and having done so returns it to its place, or informs the owner, this is only a trespass. 1 *Hale, P. C.* 509. In the same manner if A. takes away the goods of B., openly before him or other persons, this carries with it evidence only of a trespass. *Ibid.* So of a servant riding his master's horse upon his own business. *Ibid.* The two prisoners were charged with stealing two horses. It appeared that they went in the night to an inn kept by the prosecutor, and took a horse and mare from his stable, and rode about 33 miles to a place, where they left them in the care of the ostler, stating that they should return. They were apprehended the same day, about 14 miles from the place. The jury found the prisoners guilty, but added that they were of opinion they merely meant to ride the horses to this place, and to leave them there; but that they had no intention either of returning them, or making any further use of them. The judges, upon this finding, (Grose, J. *diss.* and Lord Alvanley not giving any express opinion,) held it to be a trespass only, and no larceny. They said there was no intent in the prisoners to change the property, or to make it their own, but only to use it for a special purpose, that is, to save their labour in travelling. The judges agreed that it was a question for the jury, and that if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. *Philipp's case,* 2 *East, P. C.* 662. So where, upon an indictment for stealing a horse, two saddles, &c., it appeared that the prisoner got into the prosecutor's stables, and took away the horse and the other articles altogether; but that when he had got to some distance he turned the horse loose, and proceeded on foot, and attempted to sell the saddles; Garrow, B. left it to the jury to say, whether the prisoner had any intention of stealing the horse; for that if he intended to

steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for the purpose, he would not in point of law be guilty of larceny. *Crump's case*, 1 *C. & P.* 658. Upon the same principle the following case was decided. The prisoner was indicted for stealing a straw bonnet. It appeared that he entered the house where the bonnet was, through a window which had been left open, and took the bonnet, which belonged to a young girl whom he had seduced, and carried it to a hay-mow of his own, where he and the girl had been twice before. The jury thought that the prisoner's intent was to induce the girl to go again to the hay-mow, but that he did not mean to deprive her of the bonnet. On a case reserved, the judges held that this taking was not felonious. *Dickinson's case*, *Russ. & Ry.* 420.

The prosecutor met the prisoner, whom he knew to be a poacher, and seized him. The prisoner getting free, wrested a gun from the hands of the prosecutor, and ran away with it. It was proved that the next day the prisoner said he would sell the gun, and it was never found. Vaughan, B. told the jury, upon the trial of the prisoner for stealing the gun, that he might imagine that the prosecutor would use the gun so as to endanger his life, and if so, his taking it under that impression would not be felony; but if he took it, intending at the time to dispose of it, it would be felony. *Holloway's case*, 5 *C. & P.* 524. *See Knight's case*, 2 *East*, *P. C.* 510. *Anon. Matth. Dig. C. L.* 48, *cited post*. *See Van Muyen's case*, *Russ. & Ry.* 118; and the observations of the Criminal Law Commissioners, 1*st Rep.* 17, 18.

Proof of the felonious intent in the taking—goods taken under a fair claim of right.] If there be any fair claim of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal. 2 *East*, *P. C.* 659. Thus where the owner of land takes a horse damage feasant, or a lord seizes it as an estray, though perhaps without title, yet these circumstances explain the intent, and show that it was not felonious; but these facts may be rebutted, as, by showing that the horse was marked, in order to disguise him. 1 *Hale*, *P. C.* 506, 507; 2 *East*, *P. C.* 659. After a seizure of uncustomed goods, several persons broke, at night, into the house where they were deposited, with intent to retake them for the benefit of the former owner; and it was held that this design rebutted the presumption of a felonious intent. *Knight's case*, 2 *East*, *P. C.* 510, 659, *stated post*, "*Burglary.*"

Whether the taking of corn by gleaners is to be considered as a trespass only, or whether it is to be regarded as a felony, must depend upon the circumstances of the particular case. In some places, a custom, authorising the practice of gleaning, is said to

exist; in others, it is sanctioned by the permission of the tenant of the land; and even where no right whatever exists, yet if the party carry away the corn under a mistaken idea of right, the act would not amount to larceny, the felonious intent being absent. A conviction, however, is said to have taken place at the Old Bailey, upon an indictment for the exercise of this supposed right; but the circumstances of the case are not stated. *Woodfall, Landl. and Ten.* 242, (*ed.* 1814,) 2 *Russell*, 99.

Proof of the felonious intent in the taking—goods procured by finding.] The law respecting the converting of goods found, to the finder's own use, depends upon the question of felonious intention. "If," says Lord Hale, "A. finds the purse of B. in the highway, and takes and carries it away, and the case has all the circumstances that prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony." 1 *Hale, P. C.* 506. But, he adds, where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretence of finding must not excuse. *Id.* The distinction, therefore, appears to be, that where the goods are found in such a situation that the owner may be presumed to have abandoned the property in them, the converting of them will not be larceny; but if, from circumstances, the finder must infer that there has been no such abandonment, it will be felony to convert them without making due inquiry as to the owner. Thus it is said by Lord Hale, that if a man hides a purse of money in his corn mow, and his servant, finding it, takes part of it; if, by circumstances, it appear that he knew his master laid it there, it is felony; but then the circumstances must be pregnant, otherwise it may be reasonably interpreted to be a bare finding, being an unusual place for such a *depositum*. 1 *Hale, P. C.* 507.

In the following cases, although, in strictness, the goods were acquired by finding, yet the converting of them was held to be larceny. A gentleman left a trunk in a hackney coach, and the coachman, taking it, converted it to his own use, this was held to be larceny; for the coachman must have known where he took the gentleman up, and where he set him down, and ought to have restored his trunk to him. *Lamb's case*, 2 *East, P. C.* 664. In a similar case, where a box had been left in a coach, and was found at the house of a Jew, where the coachman had uncorded it, and taken out several articles, some of which were missing; the coachman being indicted for larceny, the judge directed the jury that, if they thought that the prisoner had detained the box merely in the hope that a reward would be offered for it, and that he meant then to return it to the owner, they ought to acquit him; but if they thought that he had uncorded the box not merely from curiosity, but with an intention to embezzle any part of its contents, and that he had actually

taken any of the goods mentioned in the indictment, it would be matter of legal consideration, whether a person so guilty should not be reached as a felon. The jury having found the prisoner guilty, upon a case reserved, the verdict was approved of by the judges. *Wynne's case*, 1 *Leach*, 413; 2 *East*, P. C. 664, 697; *and see Sears's case*, 1 *Leach*, 415, (*n.*) The prosecutor, having had his hat knocked off in a quarrel with a third person, the prisoner picked it up, and carried it home. Being indicted for larceny, Park J. said, "If a person picks up a thing, and knows that he can immediately find the owner, but, instead of restoring it to the owner, converts it to his own use, this is felony." *Pope's case*, 6 *C. & P.* 346.

A pocket-book, containing bank-notes, was found by the prisoner in the highway, and converted by him to his own use; upon which Lawrence J. observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it, by which the owner can be ascertained, and the party, instead of restoring it, converts it to his own use, such converting will constitute a felonious taking. *Anon.* 2 *Russell*, 102. And in a similar case, Gibbs C. J. stated to the jury that it was the duty of every man, who found the property of another, to use all diligence to find the owner, and not to conceal the property, (which was actually stealing it,) and appropriate it to his own use. *James's case*, 2 *Russell*, 102. Where the prisoner took a letter, supposing it belonged to himself, and finding it did not, appropriated to himself the property it contained, this appropriation was held not to make him guilty of larceny, there being no *animus furandi* when he first received the letter. *Mucklow's case*, 1 *Moody*, *C. C.* 160.

The doctrine relating to the *finding* of property was much discussed in a case which arose in the Court of Chancery. Ann Cartwright died possessed of a bureau, in a secret part of which she had concealed 900 guineas. After her death, Richard Cartwright, her representative, lent the bureau to his brother Henry, who took it to the East Indies, and brought it back without the contents being discovered. It was then sold to a person named Dick, for three guineas, who delivered it to one Green, a carpenter, to repair it. Green employed a person named Hillingworth, who discovered the money. He only received a guinea for his trouble, and the guineas were secreted by Green, by his wife, and one Mrs. Sharpe. Cartwright hereupon filed his bill against Mr. and Mrs. Green and Mrs. Sharpe; in which bill Dick joined, not claiming the money on his own account. The defendants demurred to the bill, on the ground that an answer to the discovery sought might subject them to criminal punishment. Lord Eldon, after taking time to look into the cases, and consult the judges, said, "I have looked into the books, and talked with some of the judges and others, and I have not found any one person to doubt that this is a felony.

To constitute felony, there must of course be a felonious taking; breach of trust will not do. But, from all the cases in Hawkins, there is no doubt that this bureau, being delivered to Green for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered. If a pocket-book, containing bank-notes, were found in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So if a pocket-book was left in a hackney-coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquired it by finding, certainly, but not being intrusted with it for the purpose of opening it, this is felony according to the modern cases. There is a vast number of other cases, and those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." *Cartwright v. Green*, 8 *Ves.* 435; 2 *Leach*, 952.

Evidence to show that the finder endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that he could not be found; or that he made known his acquisition so that he might make himself responsible for the value, in case he should be called upon by the owner, are circumstances to rebut the presumption of a felonious taking and conversion. 2 *East*, *P. C.* 665. "The intention of a person taking property by finding will be felonious or not, according as his conduct, in omitting to use due diligence to discover the owner, or in concealing the property, or in other circumstances, shows that, in the taking, he had or had not a design to deprive the owner altogether of his property." 1*st Rep. Crim. Law Com. p.* 18.

Proof of the felonious intent in the taking—goods taken by wife—or by wife and a stranger.] If a wife take goods of which the husband is the joint or sole owner, the taking is not larceny, because they are in law but one person, and the wife has a kind of interest in the goods. *Hawk. P. C. b.* 1. *c.* 33. *s.* 19. Therefore, where the wife of a member of a friendly society, stole money belonging to the society, lodged in a box in her husband's custody, under the lock of the stewards of the society, it was held by the judges not to be larceny. *Willis's case*, 1 *Moody, C. C.* 375.

Whether where a stranger and the wife jointly steal the husband's property, it is larceny in the stranger, has been the subject of contradictory decisions. In *Clark's case*, *O. B.* 1818, 1 *Moody*, *C. C.* 376, (*n.*) it appeared that the prosecutor's wife had assisted in carrying off the goods, and had continued

to cohabit with the prisoner. On objection, the court ruled, that no person could be convicted of a felony in stealing goods when they came into his possession by the delivery of the prosecutor's wife. But in a subsequent case, referred to the opinion of the judges, it was held that where the wife and a stranger steal the goods of the husband, the stranger is guilty of larceny. *Tolfree's case*, 1 *Moody, C. C.* 243.

Proof of the taking—with reference to the possession of the goods.] It has been already stated, (*ante*, *p.* 469,) that in order to constitute larceny, there must be such a taking of the goods, as would, without the felonious intent, amount to a trespass. Therefore, if the party obtain possession of the goods lawfully, as upon a trust, for or on account of the owner, by which he acquires a kind of special property in them, he cannot afterwards be guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest with intent to convert them to his own use, he thereby determine the privity of the bailment and the special property conferred upon him, in which case he is as much guilty of a trespass, against the virtual possession of the owner, by such second taking, as if the act had been done by a mere stranger. 2 *East, P. C.* 554. *Vide post.*

Proof of the taking—with reference to the possession—original taking not felonious.] In cases, therefore, where the original taking of the goods is not *animo furandi*, a subsequent conversion of them to the party's own use will not constitute larceny. Upon an indictment for stealing, it appeared that the prosecutor's shop (containing the articles mentioned in the indictment) being on fire, his neighbours assisted him in removing his goods for their security. The prisoner probably had removed all the articles which she was charged with stealing, when the prosecutor's other neighbours were thus employed. She removed some of the articles in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor applying to her next morning, she denied that she had any of the things belonging to him, but they were found concealed in her house. The jury found her guilty, but said, that in their opinion when she first took the goods from the shop, she had no evil intention, but that such evil intention came upon her afterwards; and upon reference to the judges, they all held the conviction wrong, for if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust. *Leigh's case*, 2 *East, P. C.* 694, 1 *Leach*, 411. (*n.*)

So where a letter containing a bill of exchange was by mistake delivered to another person of the same name as the person to whom it was addresse d,and the person to whom it was so

delivered, converted the bill of exchange to his own use, being convicted of larceny for this act, a case was reserved for the opinion of the judges, who held the conviction wrong, on the ground that it did not appear that the prisoner had any *animus furandi*, when he first received the letter; and a pardon was recommended. *Mucklow's case*, 1 *Moody, C. C.* 160. *See* 1*st Rep. Crim. Law, Com.* 17.

Proof of the taking—with reference to the possession—original taking not felonious—bailees.] The cases which most usually occur, illustrative of this doctrine, are those where goods have been delivered into the hands of a bailee for a special purpose, who thereby acquires a right to the possession, and who, if he converts them, while in his possession as bailee, to his own use, even *animo furandi*, as he is not guilty of a trespass, is not guilty of larceny by that act. Thus if goods are delivered to a carrier to be conveyed, and he steals them on the journey, it is no felony. 1 *Hale, P. C.* 504. So where a man delivered his watch to the prisoner to be repaired, who instead of repairing it sold it, this was ruled by Vaughan B. to be no felony. *Levy's case*, 4 *C. & P.* 241.

The captain of a vessel having a number of casks of butter belonging to the prosecutor to carry on board his vessel, and having occasion to pay a debt contracted by him at a port in course of his voyage, gave an order to his mate to deliver thirteen casks of the butter to his creditor, and the casks were delivered accordingly. Being indicted for larceny, Graham B., before whom he was tried, thought that the severance of a part of the casks from the rest, and the formed design of doing so, took the case out of the authorities cited, (1 *Hale, P. C.* 504, 2 *East, P. C.* 693,) if they could be considered as applying to the case, and the prisoner was convicted; but upon a case reserved, the judges were of opinion that it was not larceny, and that the conviction was wrong. *Madox's case*, *Russ. & Ry.* 92. So where the prosecutor sent three trusses of hay consigned to a third person by the prisoner's cart, and the prisoner took away one of the trusses which was found in his possession, but not broken up; Parke J. held this to be no larceny, the truss not being broken up. *Pratley's case*, 5 *C. & P.* 533.

It is said by Lord Hale, that if A. delivers the key of his chamber to B., who unlocks the chamber, and takes the goods of A. *animo furandi*, this is felony, because the goods were not delivered to him, but taken by him. 1 *Hale, P. C.* 505. Upon this passage Mr. East remarks, that if the key be delivered for the purpose of intrusting the party with the care of the goods, it is as much a delivery of the goods themselves, as if each article had been put by the owner into the hands of the party. And then, although the taking of such goods out of the room with a

fraudulent intent to convert them, might still be felony, yet it would be so on another ground, because by the act of taking the goods with such intent out of the room, where they were intended to remain for safe custody, the privity of contract would be determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. 2 *East, P. C.* 685. It may be doubted, however, whether the construction put upon the case by Mr. East, is not carrying the doctrine as to the determination of the special property further than the decided cases warrant.

In these cases it is always a question for the jury, whether when the goods were taken the prisoner had a felonious intent, for if he had, the act will amount to larceny. The prosecutor hired the prisoner at Bristol to drive fifty sheep for him to Bradford. The prisoner never took the sheep to Bradford, but sold ten of them on the way. The jury found the prisoner guilty, saying, they were of opinion that at the time he received the sheep, he intended to convert them to his own use, and not to drive them to Bradford. On a case reserved, the judges were unanimously of opinion that the conviction was right. *Stock's case*, 1 *Moody, C. C.* 87. *See M'Namus's case, Id.* 388, *post*. And where goods were delivered by the prosecutor to the prisoners, (who were not carriers, and only employed by him on that occasion) to be conveyed by them, but they were to be paid for carrying them, and instead of taking them to the place directed, they stole the goods, but without opening any of the packages, it was ruled by Patteson J. to be no felony. *Fletcher's case*, 4 *C. & P.* 545.

Proof of the taking—with reference to the possession—original taking not felonious—bailees—determination of the bailment.] Upon the principle that it is not felony in a bailee to convert to his own use the goods bailed to him, a nice distinction has been grafted, which seems, says Mr. East, to stand more upon positive law, which cannot now be questioned, than upon sound reasoning. 2 *East, P. C.* 695, *but see Mr. Starkie's observations*, 2 *Evid.* 448, (*n.*) 2*d ed.* The distinction is thus stated by Lord Hale. If a man delivers goods to a carrier to carry to Dover, and he carries them away, it is no felony, but if the carrier have a bale or trunk with goods in it delivered to him, and he breaks the bale or trunk, and carries away the goods *animo furandi*, or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, it is a felonious taking. But that must be intended where he carries them to the place, and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking. 1 *Hale, P. C.* 504, 505.

This distinction has been recognized and acted upon i numerous cases, not only of carriers and other bailees, where

the bailment has been determined by breaking bulk, &c., but likewise in the case of other persons, having a special property, where the contract conferring the special property has been terminated by the tortious act of the party. A farmer sent forty bags of wheat to the prisoner, who was a warehouseman, for safe custody. The prisoner took eight of the bags, and shooting the wheat out on the floor, mixed it with four bags of inferior wheat, and sold the whole twelve for his own benefit. He replaced the wheat thus taken from the prosecutor with inferior wheat of his own. It did not appear that there was any severing of part of the wheat in any one bag, from the residue of the wheat in the *same* bag. The prisoner being convicted of larceny, the judges were unanimously of opinion that the conviction was right, that the taking of the whole of the wheat out of any one bag, was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the same bag. *Brazier's case, Russ. & Ry.* 337.

In order, therefore, to establish a larceny of goods which have been bailed, some act determining the bailment must be proved. A woman intrusted a porter to carry a bundle for her to Wapping, and went with him. In going to the place, the porter ran away with the bundle, which was lost. Being indicted for felony, Holt, C. J. told the jury, that if they thought the porter opened the bundle and took out the goods, it was felony; and he thought that the fact as above stated was evidence of it. *Anon.* 2 *East, P. C.* 697, 1 *Leach,* 415. (*n.*) Upon this case Mr. East observes, with submission to so high an authority, it may fairly be doubted, whether there were sufficient evidence before the jury on this statement, to warrant them in finding that the porter opened the bundle and took out the goods. A different ground for the determination, he continues, is suggested in another MS. (2 *MS. Sum.* 233,) *viz.* that all the circumstances of the case showed that the porter took the bundle at the first, with an intent to steal it. 2 *East, P. C.* 697.

It seems to have been the opinion of Kelynge, (*p.* 81, 82,) that the ground for holding that the opening of a packet or bale by a carrier, or other bailee, and a subsequent conversion, shall constitute felony, was because that act declares that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. There may, says Mr. East, observing upon this passage, be evidence of such a previous intent, sufficient to warrant such a conclusion in point of fact, and whether the particular evidence in that case were of such a nature, does not appear; but if the inference may be drawn from the mere fact of the carrier's embezzling the goods, there is an end of the distinction at once as to the case of breaking the package and taking out the goods.

For if the taking of part of the goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to steal them, *a fortiori*, the taking of the whole package of goods, whether broken or not, and converting it, must be evidence of such an intent; and so, indeed, Kelynge himself admits. 2 *East, P. C.* 697.

Although a contrary opinion appears to have been formerly entertained, (*See Charlewood's case*, 1 *Leach*, 409, 2 *East, P. C.* 689, *post*, 490,) yet it is now settled, that when the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, the subsequent withholding and disposing of them will not constitute a new felonious taking, nor make him guilty of felony. *Banks's case, Russ. & Ry.* 441, 2 *Russell*, 132. *See* 1*st Rep. Crim. Law. Com. p.* 25.

Proof of the taking—with reference to the possession of the goods—cases of servants.] Where a person has the bare charge or custody of goods, the legal possession of such goods remains in the owner, and larceny may be committed by the person having such a bare possession or custody. He that has the care of another's goods, says Lord Hale, has not the possession of them, and therefore may, by his felonious embezzling of them, be guilty of felony; as the butler who has the charge of his master's plate, the shepherd who has the charge of his master's sheep; and so it is of an apprentice that feloniously embezzles his master's goods. 1 *Hale*, 506. 2 *East, P. C.* 554. So where a carter goes away with his master's cart. *Robinson's case*, 2 *East, P.C.* 565. The prisoner was a drover, and had been employed by the prosecutor as such, off and on, for nearly five years. Being employed by him to drive a number of sheep to a fair, he sold several of them, and applied the money to his own purposes. Being indicted for larceny he was found guilty; but the jury also found that he did not intend to steal the sheep at the time he took them into his possession. On a case reserved, all the judges who met were of opinion, that as the owner parted with the custody only, and not with the possession, the prisoner's possession was the owner's, and that the conviction was right. *M'Namee's case*, 1 *Moody, C. C.* 368; *and see Stock's case, Id.* 87. The prisoner was employed by the prosecutor as his foreman and book-keeper, but did not live in his house. The prosecutor delivered a bill of exchange to him, with orders to take it to the post, that it might be transmitted to London. The prisoner got cash for the bill, with which he absconded. It was objected that by the delivery the prosecutor had parted with the possession of the bill, and the

case was resembled to that of a carrier intrusted with goods; but the judges held it larceny, on the principle that the possession still remained in the master. *Paradice's case*, 2 *East*, *P. C.* 565, *cited* 1 *Leach*, 523, 524. The prisoner was employed as a porter by the prosecutor, who delivered to him a parcel to carry to a customer. While carrying it he met two men, who persuaded him to dispose of the goods, which he did, taking them out of the parcel and receiving part of the money. All the judges held this to be larceny, as the possession still remained in the master. *Bass's case*, 2 *East*, *P. C.* 566, 1 *Leach*, 251, 523.

So where the prosecutor delivered to his servant a sum of money to carry to a person, who was to give him a bill for it, and the servant appropriated it to his own use, the judges were of opinion that this was not a mere breach of trust, but a felony. *Lavender's case*, 1793, *twice considered by the judges*. 2 *East*, *P. C.* 566, 2 *Russ.* 201. And where the servant of the prosecutor went to her master's wife, and told her she was acquainted with a person who could give her ten guineas' worth of silver, and the prosecutor's wife gave her ten guineas for that purpose, which she ran away with, she was found guilty of the larceny. *Atkinson's case*, 1 *Leach*, 302, (*n.*) 2 *Russ.* 201. So where the clerk of a banker told a customer of the house that he had paid in money to his account, and thereby induced the customer to give him a check to the amount, for which the prisoner took bank-notes out of the drawer, and afterwards made fictitious entries in the books to prevent a discovery of the transaction, it was held, on a case reserved for the opinion of the judges, that this was a felonious taking of the bank-notes from the drawer, and not an obtaining of them under a false pretence. *Hammon's case*, 2 *Leach*, 1083, 4 *Taunt.* 304, *Russ. & Ry.* 221, 2 *Russ.* 202.

Where a clerk or servant takes a bill of exchange belonging to his master, gets it discounted, and converts the proceeds to his own use, this is a larceny of the bill, though the clerk have authority to discount bills. In a case of this kind it was contended on behalf of the prisoner, that the bill having come legally into his possession, like any other bill of the prosecutor's, over which he had a disposing power, he had a right to receive, though not to convert the money to his own use, which was, however, only a breach of trust. But Heath, J. was clearly of opinion that it was felony, the bill having been once decidedly in the possession of the prosecutor, by the clerk who got it accepted putting it amongst the other bills, in the prosecutor's desk, and the prisoner having feloniously taken it away out of that possession. *Chipchase's case*, 2 *East*, *P. C.* 567, 2 *Leach*, 699, 2 *Russell*, 202.

In order to render the offence larceny, where the property is taken by a servant, it must appear that the goods were at the

time in the possession of the master. It is not, however, necessary that they should be in his *actual* possession, it is sufficient if he has a constructive possession, or possession in law. Therefore, where a man purchases goods, and sends his servant to receive them, and the servant carries them away, it is larceny, for the property carries with it the possession in law. On the other hand, unless the possession of the goods actual or constructive, be in the prosecutor, no larceny can be committed upon them with regard to him. This distinction is very material, as drawing the line between larceny and embezzlement. In the following cases, the possession was decided to be in the prosecutor, and the offence to be larceny.

The prisoner was ordered by his masters, the prosecutors, to go with their barge to one Wilson, a corn-meter, for as much corn as the barge would carry, and which was to be brought in loose bulk. The prisoner received 220 quarters in loose bulk, and five other quarters, which he ordered to be put in sacks, and afterwards embezzled. The question reserved for the opinion of the judges was, whether this was felony, the oats never having been in the possession of the prosecutors, or whether it was not like the case of a servant receiving charge of, or buying a thing for his master, but never delivering it; but they held that this was larceny in the servant, for it was a taking from the actual possession of the owner, as much as if the oats had been in his granary. *Spears's case*, 2 *East*, *P. C.* 568, 2 *Leach*, 826, 2 *Russell*, 189. In a similar case, where the prisoner, a servant of the prosecutors, came alongside a vessel in which there was a quantity of corn which had been purchased by the prosecutors, and procured a portion to be put into sacks, which he carried away and sold, never having been employed to sell corn by his masters; on a case reserved, the judges held this to be larceny. The property of the prosecutors in the corn, observes Mr. East, was complete before the delivery to the prisoner, and after the purchase of it in the vessel, they had a lawful and exclusive possession of it against all the world, but the owner of the vessel. *Abrahat's case*, 2 *East*, *P. C.* 569, 2 *Leach*, 824, 2 *Russell*, 199. So where a servant sent to fetch away goods purchased, and lying at the London Docks, purloined them. *Harding's case*, *Russ. & Ry.* 125, 2 *Russell*, 200.

If the goods are not in the actual or constructive possession of the master at the time they are taken, the offence of the servant in taking them will be embezzlement, and not larceny. Therefore, where goods in the possession of a third person, and not yet delivered over to the master, are delivered to the servant, who appropriates them to his own use, this is not a larceny, for the time of the larceny must be referred to the period of the receipt of the goods by the servant, at which time there was no possession in the master, without which there could be no tres-

pass, and no larceny. *Vide ante*, (*p.* 469.) If, says Mr. East, the master had no otherwise the possession of the goods than by the bare receipt of his servant, upon the delivery of another for the master's use, and the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like; although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting the goods to his own use; because as to him, there was no tortious taking in the first instance, and consequently no trespass, as there is where a servant converts to his own use property in the virtual possession of his master. 2 *East, P. C.* 568.

The prisoner, a cashier at the Bank of England, was indicted for stealing certain India bonds, laid as the property of the Bank in one count, and in another, of a person unknown. The bonds were paid into the Bank by order of the Court of Chancery, and according to the course of business, ought to have been deposited in a chest in the cellars. The prisoner, who received them from the Court of Chancery, put them in his own desk, and afterwards sold them. The Court before which the prisoner was tried, was of opinion, that this was not felony; that the possession of the bonds was always in the prisoner, and that the Bank had no possession which was not his possession, until the bonds were deposited in the cellars as usual; and one of the judges took the distinction between a possession sufficient to maintain a civil action, and a possession whereon to found a criminal prosecution. *Waite's case*, 2 *East, P. C.* 570. Money in cash and Bank notes, was paid into a bank to a clerk there, whose duty it was to receive and give discharges for money, and to place the bank-notes in a drawer; he gave an acknowledgment for the sum in question, but kept back a 100*l.* banknote, and never put it in the drawer. On a case reserved, some doubt was at first entertained amongst the judges, but at last, all assembled agreed that this was no felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner, though it would have been otherwise, if the prisoner had deposited it in the drawer, and had afterwards taken it. They thought that this was not to be differed from the cases of *Waite*, (*supra*, 485,) *and Bull*, (*post*, *p.* 485,) which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner, and here it was delivered into the possession of the prisoner. They said, that though to many purposes the note was in the possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached, for it was a lawful one. Eyre C. J., also observed, that the cases ran into one another very much, and were hardly

to be distinguished; and that in *Spears's case*, the corn was in the possession of the master, under the care of the servant. *Bazeley's case*, 2 *East*, *P. C.* 571, 2 *Leach*, 835, 2 *Russell*, 205. In consequence of this case, the statute 39 G. 3. c. 85, (now repealed by 7 & 8 G. 4. c. 29,) against embezzlements by clerks and servants, was passed. 2 *Leach*, 849. The prosecutor suspecting that he was robbed by the prisoner, his servant, who attended the shop, employed a customer to come to his shop on pretence of purchasing, and gave him some marked silver of his own, with which the customer came to the shop in the absence of the owner, and bought goods of the prisoner. Soon after the master coming in, examined the till, in which the prisoner ought to have deposited the money when received, and not finding it there, procured him to be arrested, and on search, the marked money was found upon him. On a case reserved, the judges were of opinion that the prisoner was not guilty of felony, but only of a breach of trust; the money never having been put into the till; and, therefore, not having been in the possession of the master against the defendant. *Bull's case, cited in Bazeley's case*, 2 *East*, *P. C.* 572, 2 *Leach*, 841, 2 *Russell*, 204. So where a servant was sent by his master to get change for a 5*l.* note, which he did, saying it was for his master, but never returned, being convicted of stealing the change, the judges, on a case reserved, held this to be no larceny, because the master never had possession of the change, except by the hands of the prisoner. *Sullen's case*, 1 *Moody*, *C. C.* 129.

The punishment of larceny, when committed by clerks and servants, is regulated by the 7 & 8 G. 4. c. 29. s. 46, which enacted for the punishment of depredations committed by clerks and servants, that if any clerk or servant shall steal any chattel, money, or valuable security, belonging to, or in the possession or power of his master, every such offender being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.

Proof of the taking—with reference to the possession—cases of lodgers.] It was for some time considered a doubtful point whether the taking of goods by a lodger was larceny at common law, on the ground, that like a bailee, he had the possession of the goods, but at last it was held, that it was not larceny. *Meeres's case*, 1 *Shower*, 50, 2 *Russell*, 246. Upon this decision Mr. East observes, that if it clearly appears that the prisoner took the lodgings with the intent to gain a better opportunity of rifling them, and to elude the law, there seems to be no reason why it should not be felony at common law. 2 *East*, *P. C.* 585. To

remedy this state of the law, the statute 3 & 4 W. & M. c. 9, was passed, making the offence larceny. That act being repealed by the 7 & 8 G. 4. c. 27, it is by the 7 & 8 G. 4. c. 29. s. 45, enacted, for the punishment of depredations committed by tenants and lodgers, that if any person shall steal any chattel or fixture let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

Under the repealed statute, it was held that where the whole house, ready furnished, was let to the prisoner, it was not a case within the statute, which was meant to apply to cases where the owner had a possession, and the lodger the use. *Palmer's case*, 2 *East*, P. C. 586. But such a case is within the provisions of the new statute, which applies to *houses* and *tenants*. Under the former statute also, it was held that it was no objection to state that the lodgings were let by the *wife* of the owner, for that the contract might be stated, according either to the fact or the legal operation; and it seems to have been thought unnecessary to state *by whom* the lodgings were let, and that if there was a mistake in the name of that party, the allegation might be rejected as surplusage. *Healey's case*, 1 *Moody*, C. C. 1.

Proof of the taking—with reference to the possession—stealing from the person.] The stealing from the person without violence, or putting in fear, was provided against by the statute 48 G. 3. c. 129. s. 2, (now repealed;) by which it was enacted, that any person who should feloniously steal, take, and carry away any money, goods, or chattels, from the person of any other, whether privily, without his knowledge, or not, but without such fear, or putting in fear, as is sufficient to constitute the crime of robbery, should be liable, &c.

In a case upon this statute, it was held that the indictment need not negative the force or fear, and that, although such force and fear did in fact exist, the prisoner might be convicted under this act. *Pearce's case*, *Russ. & Ry.* 174, 2 *Leach*, 1046. And the same point was held in a subsequent case. *Robinson's case*, *Russ. & Ry.* 321.

The above statute being now repealed by the 7 & 8 Geo. 4. c. 27, it is enacted by stat. 7 & 8 Geo. 4. c. 29. s. 6, that if any

person shall steal any such property [*viz.* any chattel, money, or valuable security,] from the person of another, or shall assault any other person, with intent to rob him, or shall with menaces, or by force, demand any such property of any other person, with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.

To support a prosecution for stealing from the person, the prosecutor must prove, 1, the taking, 2, of the goods, &c., and, 3, from the person. The taking, and the nature of the goods taken, will be proved as in other cases of larceny.

The taking from the person, to constitute this offence, may be either with or without the knowledge of the owner; but the property must be completely removed from the person. The following evidence was held not to be sufficient. The prosecutor said, "I felt a pressure of two persons, one on each side of me; I had secured my book in an inside pocket of my coat; I felt a hand between my coat and waistcoat, I was satisfied that the prisoner was attempting to get my book out. The other person had hold of my right arm, and I forced it from him, and thrust it down to my book; in doing which, I brushed the prisoner's hand and arm. The book was just lifted out of my pocket; it returned into my pocket. It was out, how far I cannot tell; I saw a slight glance of a man's hand down from my breast; I secured the prisoner after a severe struggle." On cross-examination, the prosecutor said, "I am satisfied the book was drawn from my pocket; it was an inch above the top of the pocket." The prisoner being convicted, on a case reserved, six of the judges thought that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of their lordships were of a contrary opinion; but the judges were unanimously of opinion that the simple larceny was complete. *Thomson's case*, 1 *Moody, C. C.* 78. *Vide, ante, p.* 471.

Proof of the taking—distinction between larceny and obtaining goods, &c. by false pretences.] Although the distinction between larceny and the obtaining of goods, &c. by false pretences, is not so material, since the statute 7 & 8 Geo. 4. c. 29. s. 53, which provides, that where a person is indicted for the misdemeanor, and it appears that he obtained the property in such a manner as to amount to larceny, he shall not, by reason thereof, be acquitted; yet as the converse is not the case, it is material to inquire what circumstances will be held to constitute the respective offences.

As the character of the transaction depends upon the intention of the parties, that intention must determine the nature of the offence. It is not however sufficient to show simply a felonious intent, an *animus furandi* on the part of the offender; although such would seem to have been the opinion of Ashurst J., who says, "Wherever there is a real and *bonâ fide* contract and delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bonâ fide* contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony." *Pear's case*, 2 *East*, P. C. 688. (*n.*) It will be seen, however, by the cases about to be cited, that the mere intent to commit felony, or rather fraudulently to appropriate the matter in question to the party's own use, is not sufficient to render the taking felonious, where the owner, although induced by the false representations of the offender, intends to part with his property in the matter delivered. The law of Scotland is the same as our own on this point; and the principle of the distinction, between larceny and false pretences, is well expressed in the following passage from a writer on the criminal law of that country. "Where possession is obtained by such false representations as induce the owner to sell or part with *the property*, the crime is swindling. But a variety of cases frequently occur, in which the possession is obtained, not on any contract or agreement adequate to pass the property, but on some inferior title, adequate to give the prisoner the right of *interim* custody. The distinction between such cases, and those in which the property is obtained on a false pretence, lies here, —that in the one case, the proprietor has agreed to transfer the property, and therefore he has only been imposed upon in the transaction; in the other, he has never agreed to part with his property, and therefore the subsequent appropriation is theft." *Alison's Princ. Crim. Law of Scotl.* 259.

To prevent the case from amounting to larceny, the delivery of the goods must be by some person having authority, by such delivery, to pass the property. Therefore, where the prisoner procured a parcel from the servant of a carrier, by falsely pretending that he was the person to whom it was addressed, and being indicted for larceny, the jury found, that when the prisoner obtained the goods he knew they were not his own property, and intended to steal them; the judges, on a case reserved, held that the conviction of the prisoner for larceny was right, on the ground that the ownership of the goods was not parted with, the carrier's servant having no authority to part with the ownership to the prisoner, and the taking was therefore larceny. *Longstreeth's case*, 1 *Moody, C. C.* 137; *see Jackson's case, Id.* 119, *post*, 499; *Wilkins's case*, 2 *East*, P. C. 673, *post*, *p.* 493.

Proof of the taking—no intent to part with property by the prose-

cutor—original felonious intent on the part of the prisoner—cases of hiring horses, &c.—larceny.] In the following case, the owner of the goods having no intention of parting with the property in them, and the offender having, at the time of obtaining them, the *animus furandi*, the circumstances were held to constitute a felony. The prisoner hired a mare for a day from the prosecutor in London, in order to go to Sutton in Surrey, and said he should return the same evening. The prisoner gave the prosecutor a false reference. On the afternoon of the day on which he hired the mare, the prisoner sold her in Smithfield. The jury found the prisoner guilty of stealing the mare, and a case was reserved for the opinion of the judges, which underwent great discussion. Two of their lordships thought, that as the mare was obtained from the owner by means of asserting that which was false, *viz.* that the prisoner wanted to go a journey which he never intended to take, and as the statutes 33 Hen. 8. and 30 Geo. 2. had made the offence of obtaining goods by false tokens, or false pretences, punishable as a misdemeanor only, and the 33 Hen. 8. had distinguished the case of obtaining goods by false tokens from obtaining goods by stealth, they were bound by those statutes to say that the prisoner's offence was not felony. A majority of their lordships, however, held that this case did not come within the statutes 33 Hen. 8. and 30 G. 2. relating to false pretences, which were not intended to mitigate the common law, or to make that a less offence which was a greater one before. They held, that where an original felonious intent appeared, those statutes did not apply. They said, that if no such intent appeared, if the means mentioned in the statutes were made use of, the legislature had made the offender answerable criminally, who before, by the common law of the land, was only answerable civilly. *Pear's case*, 2 *East*, *P. C.* 685, 1 *Leach*, 212. It will be observed, that, in this case, the prosecutor did not intend to part with the *property* in the horse, and no question arose upon that point.

The following case, under similar circumstances, was decided the same way. The prisoner, a post-boy, applied to the prosecutor, a livery stable-keeper, for a horse, in the name of a Mr. Ely, saying that there was a chaise going to Barnet, and that Mr. Ely wanted a horse for his servant to accompany the chaise, and return with it. The horse was delivered by the prosecutor's servant to the prisoner, who mounted him, and, on leaving the yard, said he was going no further than Barnet. He only proceeded a short way on the road to Barnet, and on the same day sold the horse in Goodman's-fields for a guinea and a half, including saddle and bridle. The horse was much injured, and appeared to have been ridden very hard. The purchaser sold the horse for 2*l.* 15*s.* The Court observed, that the judges, in *Pear's case*, had determined, that if a person, at the time he obtained another's property, meant to convert it to his

own use, it was felony. That there was a distinction, however, to be observed in this case, though it was so nice that it might not be obvious to common understandings; for if they thought that the prisoner, at the time of hiring the horse for the purpose of going to Barnet, really intended to go there, but, finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of proceeding to the place, it would not amount to a felonious taking. That there was yet another point for their consideration; for though the prisoner really went to Barnet, yet, being obliged by the contract to re-deliver the horse to the owner on his return, if they thought that he did perform the journey, and that after his return, instead of re-delivering it to the owner, converted it to his own use, he would thereby be guilty of felony, for the end and purpose of the journey was then over. The jury found the prisoner guilty on the first ground, and he was executed. *Charlewood's case*, 2 *East*, *P. C.* 689, 1 *Leach*, 409.

Major Semple's case was also decided upon the point of the prisoner's intention. Under the name of Major Harrold, he had been in the habit of hiring carriages from the prosecutor, a coach-maker, and on the 1st of Sept. 1786, he hired the chaise in question, saying, he should want it for three weeks or a month, as he was going a tour round the north. It was agreed that he should pay at the rate of 5*s.* a day during that time, and a price of fifty guineas was talked about, in case he should purchase it, on his return to London, which was suggested by the prisoner, but no agreement took place as to the purchase. A few days afterwards the prisoner took the chaise with his own horses from London to Uxbridge, where he ordered a pair of horses, went to Bulstrode, returned to Uxbridge, and got fresh horses. Where he afterwards went did not appear. He was apprehended a year afterwards on another charge. Being indicted for stealing the chaise, it was argued for him, that he had obtained the chaise under a contract, which was not proved to be broken, and that this distinguished it from *Pear's case*, (*ante*, *p.* 489,) and *Aickle's case*, (*post*, *p.* 492,) that the chaise was hired generally, and not to go to any particular place; that he had therefore a legal possession, and that the act was a tortious conversion, and not a felony. It was also argued, that there was no evidence of a tortious conversion; for *non constat*, that the prisoner had disposed of the chaise. The court, however, said, that it was now settled, that the question of intention was for the jury, and if they were satisfied that the original taking of the chaise was with a felonious intent, and the hiring a mere pretence, to give effect to that design, without intention to restore or pay for it, it would fall precisely within *Pear's case*, and the other decisions, and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to

make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it; but if there were a *bonâ fide* hiring, and a real intention of returning it, at the time, the subsequent conversion of it would not be felony; for by the contract *and delivery*, the prisoner would have obtained the lawful possession of the chaise, and his subsequent abuse of the trust would not be felony. The court also held that there was sufficient presumptive evidence of a conversion, and the prisoner was found guilty. *Semple's case, O. B. Cor. Gould J. & Adair Serj. Rec.* 2 *East, P. C.* 691, 1 *Leach*, 420.

It will be observed, that in this case the judges adverted to the fact, that the prosecutor only intended to give a qualified possession, a distinction which will be afterwards fully noticed.

The doctrine at the conclusion of *Charlewood's case, supra, p.* 490, that if the prisoner on his return to London, instead of restoring the horse to the owner, had converted it to his own use, he would have been guilty of a felony, *(see also Tunnard's case, O. B.* 1 *Leach*, 214, (*n.*) has been since overruled. The prisoner borrowed a horse under pretence of carrying a child to a neighbouring surgeon. Whether he carried the child thither did not appear; but the day following he took the horse in a different direction and sold it. The prisoner did not offer the horse to sale, but was applied to to sell it, so that it was possible that he might have had no felonious intention till that application was made. The jury thought that the prisoner had no felonious intention when he took the horse, but the learned judge thought, that as it had been borrowed for a special purpose, and that purpose was over when the prisoner took the horse to the place where he sold it, it was proper to submit the point to the consideration of the judges, who after consideration were of opinion, that the doctrine laid down on the subject in 2 *East, P. C.* 690, and 2 *Russell*, 1089 *and* 1090, (*1st ed.*) was not correct. They held, that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it, did not constitute a new felonious taking, and make him guilty of felony; and that consequently, the conviction could not be supported. *Banks's case, Russ. & Ry.* 441, 2 *Russell*, 132, *2d ed. and vide post, Larceny by Servants.*

Proof of taking—no intent by prosecutor to part with the property in the goods—original felonious intent on the part of the prisoner—various cases amounting to larceny where goods are obtained by false pretences.] There is a numerous class of cases in which goods have been obtained from the owner with a fraudulent intent, but where the owner only intended to part with the possession, and not with the property in them. In these cases it has been held, that if the prisoner had the *animus*

furandi at the time of the taking, and has converted the goods to his own use, the offence amounts to larceny. It has been generally in cases of this kind, that the distinction between larceny and obtaining goods under false pretences has been lost sight of. The false pretences are only the mode employed by the offender to procure the possession of the property, and render the case no less a larceny than if he had taken the property without the knowledge of the owner, or by force. The real distinction is, whether the owner intended to pass the right of property. If he did not, it is the subject of an indictment for larceny—if he did, of an indictment for obtaining money by false pretences.

The prisoner, J. H. Aickles, was indicted for stealing a bill of exchange, the property of S. Edwards. The prosecutor wanting the bill discounted, the prisoner, who was a stranger to him, called at his lodgings and left his address, in consequence of which, Edwards called on him, and the prisoner informed him, that he was in the discounting line. Three weeks afterwards the prosecutor sent his clerk to the prisoner to know, whether he could discount the bill in question. The prisoner went with the clerk to the acceptor's house, where he agreed with the prosecutor to discount the bill on certain terms. After some conversation the prisoner said, that if Edwards would go with him to Pulteney-street, he should have the cash. Edwards replied, that his clerk should attend him and pay him the 25*s.* and the discount on receiving the money. On his departure, Edwards whispered to his clerk not to leave the prisoner without receiving the money, and not to lose sight of him. The clerk went with the prisoner to his lodgings in Pulteney-street, where the prisoner showed him a room, and desired him to wait, saying, he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street, but in turning a corner, missed him. The prosecutor and his clerk waited at the prisoner's lodgings three days and nights in vain. Being apprehended at another place, he expressed his sorrow and promised to return the bill. The bill was seen in the hands of a person who received a *subpœna duces tecum*, but he did not appear, and it was not produced. It was objected, 1st, that the bill ought to be produced; and 2ndly, that the facts, if proved, did not amount to felony. It was left to the jury to consider whether the prisoner had a preconcerted design to get the bill into his possession, with intent to steal it, and next, whether the prosecutor intended to part with the bill to the prisoner without having the money first paid. Upon the first point the jury found in the affirmative, and on the second in the negative, and they found the prisoner guilty. Upon a reference to the judges they held the conviction to be proper, as against both objections. *Aickles's case*, 2 *East*, *P. C.* 675, 1 *Leach*, 294.

The following observations are made by Mr. East on this

case. "From the whole transaction it appeared that Edwards never gave credit to the prisoner. It is true that he put the bill into his hands, after they had agreed upon the terms upon which it was to be discounted, that by showing it to the acceptor he might satisfy himself that it was a genuine acceptance. But besides, that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts; for Edwards, or his clerk by his direction, continued with the prisoner until he ran away, for the very reason, because they would not trust him with the bill." 2 *East, P. C.* 677.

The prisoner was indicted for stealing a quantity of stockings. Meeting the prosecutor's apprentice on Ludgate Hill, he asked him if he was going to Mr. Heath, a hosier in Milk-street. The apprentice had at that time under his arm two parcels directed to Mr. Heath, containing the articles in question, and having answered in the affirmative, the prisoner told him that he knew his master, and owed him for the parcels, and he then gave the lad a parcel, which was afterwards found to be of no value, telling him to take it to his master directly, that it might be forwarded to a Mr. Browne, and then, with the consent of the apprentice, he took from him the parcels in question. The boy then left the prisoner, but returned and asked him if he was Mr. Heath. The prisoner replied, that he was, on which the boy again left him. The jury found the prisoner guilty, but the recorder doubting whether the facts amounted to felony, referred the case to the judges, who were of opinion that the conviction was proper; Mr. Justice Gould, in stating the reasons of the judgment, laid down the following rules as clearly settled: that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only intrusted with the care or custody of it for a particular purpose. *Wilkins's case*, 2 *East, P. C.* 673, 1 *Leach*, 520.

Proof of the taking—no intent to part with the property by the prosecutor—original felonious intent on the part of the prisoner—cases of pretended purchases—larceny.] Where the owner of goods, which are taken by another with a fraudulent intent to convert them to his own use, parts with his property in such goods, although under the false pretence of a purchase, it is no larceny, as will be seen from the cases afterwards stated; but if there be only a negotiation for a purchase, and such purchase be not complete, the taking will amount to larceny, if there be a felonious intent on the part of the prisoner, as in the following case, which well illustrates the distinction between the offence of larceny, and of obtaining goods under the false pretence of

purchasing them. The prisoner was indicted for stealing two silver cream ewers from the prosecutor, a silversmith. He was formerly servant to a gentleman, who dealt with the prosecutor, and some time after he had left him, he called at the prosecutor's shop, and said that his master, (meaning the gentleman whose service he had left,) wanted some silver cream ewers, and desired the prosecutor to give him one, and to put it down to his master's account. The prosecutor gave him two ewers, in order that his master might select the one he liked best. The prisoner took both, sold them, and absconded. At the trial the prosecutor swore that he did not charge the master (his customer) with the cream ewers, nor did he intend to charge him with either, until he had first ascertained which of them he had selected. It was objected for the prisoner, that this amounted merely to obtaining goods under false pretences; but Bayley J. held, that as the prosecutor intended to part with the possession only, and not with the right of property, the offence was larceny, but that if he had sent only *one* cream ewer, and had charged the customer with it, the offence would have been otherwise. *Davenport's case, Newcastle Spring Assizes*, 1826. *Archbold's Peel's Acts*, 5. The prisoner having bargained for some oxen, of which he agreed to become the purchaser, went to the place where they were in the care of a boy, took them away, and drove them off. By the custom of the trade, the oxen ought not to have been taken away till the purchase-money was paid. Garrow B., left it to the jury to say, whether, though the beasts had been delivered to the prisoner under a contract, they thought he originally got possession of them without intending to pay for them, making the bargain the pretext for obtaining them, for the purpose of stealing them. The jury having found in the affirmative, the judges, in a case reserved, were unanimously of opinion that the offence amounted to felony. *Gilbert's case, Gow, N. P. C.* 225, (*n.*) 1 *Moody, C. C.* 185. The prisoner called at the shop of the prosecutor, and selected a quantity of trinkets, desiring they might be sent the next day to the inn where he lodged. An invoice was made out, and the prosecutor next day carried the articles to the inn. He was prevailed upon by the prisoner to leave them there, under a promise that he should be paid for them by a friend that evening. The prisoner and the prosecutor desired they might be taken care of. Half an hour afterwards the prisoner returned, and took the articles away. There were other circumstances showing a fraudulent intent, and the judge directed the jury, that if they were satisfied that the prisoner, when he first called on the prosecutor, had no intention of buying and paying for the goods, but gave the order for the purpose of getting them out of his possession, and afterwards clandestinely removing, and converting them to his own use, they should find him guilty, which they did, and the

judges, on a case reserved, held the direction and conviction right. *Campbell's case*, 1 *Moody, C. C.* 179. This case was soon afterwards followed by another, to the same effect. The prisoner bargained for four casks of butter, to be paid for on delivery, and was told he could not have them on any other terms. The prosecutor's clerk at last consented that the prisoner should take away the goods, on the express condition that they should be paid for at the door of his house. The prisoner never took the goods to his house, but lodged them elsewhere. The prisoner was indicted for stealing the goods. The jury found that he had no intention to buy the goods, but to get them by fraud from the owner. A case being reserved, the judges were unanimously of opinion that the felony was complete, and the conviction good, the jury having found that the prisoner never meant to buy, but to defraud the owner. *Pratt's case*, 1 *Moody, C. C.* 250.

Proof of the taking—intent to part with the property by prosecutor—original felonious intent on the part of the prisoner—false pretences.] It may be laid down as a well established principle, that if the owner of goods intends to part with the property in them to the prisoner, and in pursuance of such intention, delivers the goods to him, and he takes them away, he is not guilty of felony, although at the time of taking the goods he had no intention of paying for them, or otherwise performing his contract with the owner, but intended to appropriate them to his own use.

In the various cases before-mentioned, (*p.* 487, to *p.* 495,) it will be observed, that the owner of the goods had only intended to pass the possession of them to the prisoner; in all the cases under the present head, the intention was to pass the property.

Proof of the taking—intent to part with the property by prosecutor—original felonious intent of the prisoner—pretended purchases—false pretences.] The prisoner was indicted for horse stealing, and it appeared in evidence that he met the prosecutor at a fair with a horse, which the latter had brought there for sale. The prisoner being known to him, proposed to become the purchaser. On a view of the horse, the prosecutor told the prisoner he should have it for 8*l.*, and calling his servant, ordered him to deliver it to the prisoner, who immediately mounted the horse, telling the prosecutor that he would return immediately, and pay him. The prosecutor replied, "Very well," and the prisoner rode away, and never returned. Gould J., ordered an acquittal, for here was a complete contract of sale and delivery; the property, as well as possession, was entirely parted with. *Harvey's case*, 2 *East, P. C.* 669, 1 *Leach*, 467. In this case, it was observed by the judge, that the prosecutor's only remedy was by action. 1 *Leach*, 467. Had any false

pretences been used, the prisoner might have been indicted under the 30 G. 2. c. 24.

Parks was indicted for stealing a piece of silk, the property of Thomas Wilson. The prisoner called at Wilson's warehouse, and having looked at several pieces of silk, selected the one in question. He said his name was John Williams, that he lived at No. 6, Arabella-row, and that if Wilson would send it that evening, he would pay him for it. Wilson accordingly sent his shopman with it, who, as he was taking the goods, met the prisoner. The latter took him into a room at No. 6, Arabella-row, examined the bill of parcels, and gave the servant a bill drawn by Freth and Co., at Bradford, on Taylor and Co., in London. The bills were for more than the price of the goods. The servant could not give change, but the prisoner said he wanted more goods, and should call the following day, which he did not do. Taylor and Co. said the notes were good for nothing, and that they had no correspondent at Bradford. Before the goods were sent from Wilson's, they were entered in a memorandum-book, and the prisoner was made debtor for them, which was the practice where goods were not paid for immediately. It was left to the jury to consider whether there was, from the beginning, a premeditated plan on the part of the prisoner to obtain the goods without paying value for them, and whether this was a sale by Wilson, and a delivery of the goods with intent to part with the property, he having received bad bills in payment through the medium of his servant. The jury found that, from the beginning, it was the prisoner's intention to defraud Wilson, and that it was not Wilson's intention to give him credit, and they found him guilty. But the judges were of opinion that the conviction was wrong, the *property*, as well as the possession having been parted with, upon receiving that which was accepted as payment by the prosecutor's servant, though the bills afterwards turned out to be of no value. *Parkes's case*, 2 *East*, *P. C.* 671, 2 *Leach*, 614.

The circumstances of this case would have supported an indictment for obtaining the goods under false pretences. The prisoner after his acquittal, was convicted for obtaining a gold watch from a Mr. Upjohn, by falsely pretending that he wanted to purchase it, that he lived at No. 27. Cambden-street, Islington, and that he would pay for the same on delivery. 2 *Leach*, 616.

Where the goods have been purchased *by a third person*, and the prisoner obtains possession of them in that person's name, by false pretences, as the owner intends to part with the property, though to the third person, it has been held not to amount to felony. The prisoner was indicted for stealing a hat, in one count laid to be the property of Robert Beer, in another of John Paul. The prisoner bought a hat of Beer, a hat-maker, at Islington; but was told he could not have it without paying

for it. While in the shop, he saw a hat which had been made for Paul, and saying that he lived next door to him, asked when Paul was to come for his hat. He was told in half an hour or an hour. Having left the shop, he met a boy, asked him if he knew Beer, saying that Paul had sent him to Beer's for his hat; but that as he owed Beer for a hat himself, which he had not money to pay, he did not like to go. He asked the boy (to whom he promised something for his trouble) to carry the message to Beer's, and bring Paul's hat to him, (the prisoner.) He also told the boy not to go into Beer's shop, if Paul, whom he described, should be there. The boy went, and delivered the message, and received the hat, which, after carrying part of the way by the prisoner's desire, he delivered to him, the prisoner saying he would take it himself to Paul. The prisoner was apprehended with the hat in his possession. It was objected for him, that this was not a larceny, but an obtaining goods under false pretences. The prisoner being found guilty, the question was reserved for the opinion of the judges, who decided that the offence did not amount to a felony, the owner having parted with his property in the hat. *Adams's case*, 2 *Russell*, 113, 2*d ed.*

Proof of the taking—intent to part with the property by prosecutor—original felonious intent of prisoner—cases of obtaining goods, &c. by false pretences.] Under this head may be classed the cases, strictly speaking, of obtaining money under false pretences, cases in which, on account of the owner of the goods, &c. intending to part with the property in them, the offence does not amount to larceny, and where the possession of the goods has been fraudulently obtained by the prisoner under false pretences. The prisoners, Nicholson, Jones, and Chappell, were indicted for stealing two bank post bills and seven guineas. The prisoner Nicholson introduced himself to the prosecutor at the apartments of the latter in the Charter-house, under pretence of inquiring what the rules of the charity were. Discovering that the prosecutor had some money, he desired to walk with him, and having been joined by the prisoner Chappell, they went to a public house. The prisoner Jones then came into the room, and said that he had come from the country to receive 1400*l.*, and produced a quantity of notes. Chappell said to him, "I suppose you think that no one has any money but you." Jones answered, "I'll lay 10*l.* that neither of you can show 40*l.* in two hours." They then all went out, Nicholson and Chappell saying, that they should go to the Spotted Horse, and they both asked the prosecutor if he could show 40*l.* He answered, he believed he could. Nicholson accompanied the prosecutor home, when the latter took out of his desk the two bank post bills and five guineas. Nicholson advised him to take a guinea or two more, and he accordingly

took two guineas more. They then went to the Spotted Horse, where Jones and Chappell were, in a back room. Jones put down a 10*l.* note for each who could show 40*l.* The prosecutor showed his 40*l.* by laying down the notes and guineas, but did not recollect whether he took up the 10*l.* given to him. Jones then wrote four letters with chalk upon the table, and going to the end of the room, turned his back and said, that he would bet them a guinea a piece that he would name another letter which should be made and a basin put over it. Another letter was made and covered with a basin. Jones guessed wrong, and the others won a guinea each. Chappell and Nicholson then said, "We may as well have some of Jones's money, for he is sure to lose, and we may as well make it more for we are sure to win." The prosecutor then staked his two notes and the seven guineas. Jones guessed right, and the notes lying on the table, he swept them all off and went to the other end of the room, the other prisoners sitting still. A constable immediately came in and apprehended the prisoners. The prosecutor, on cross examination said, that he did not know whether the 10*l.* note given to him by Jones on showing 40*l.* was a real one or not. That having won the first wager, if the matter had ended there, he should have kept the guinea. That he did not object to Jones taking his 40*l.* when he lost, and would have taken the 40*l.* if he had won. The officers found on the prisoners many pieces of paper having numbers, such as 100, 50, &c., something in the manner of bank-notes, the bodies of the notes being advertisements of different kinds. No good notes were found upon them, but about eight guineas in cash. A lump of paper was put into the prosecutor's hands by Jones, when the officers came in, which was afterwards found to contain the two post bills. On the part of the prisoners it was contended, that this was a mere gaming transaction, or at most only a cheat, and not a felony. A doubt being entertained by the bench, on the latter point, it was left to the jury to consider whether this was a gaming transaction or a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion that it was a preconcerted scheme in all of them for that purpose, and found them guilty; but the judges held the conviction wrong, for in this case the possession as well as property had been parted with by the prosecutor, under the idea that it had been fairly won. *Nicholson's case*, 2 *East, P. C.* 669, 2 *Leach*, 610.

The prisoner who had previously pawned certain articles at the shop of the prosecutor, brought a packet of diamonds, which he also offered to pawn, receiving back the former articles. The prosecutor's servant, who had authority to act in his business, after looking at the diamonds, delivered them back to the

prisoner to seal up, when the prisoner substituted another parcel of false stones. He then received from the prosecutor's servant the articles previously pledged, and carried them away. Being indicted for stealing these articles, Arabin S. before whom he was tried, thought that inasmuch as the property was parted with by the pawnbroker's servant, absolutely, under the impression, that the prisoner had returned the parcel containing the diamonds, the offence did not amount to felony, and upon a case reserved, the judges resolved unanimously that the case was not larceny, because the servant, who had a general authority from the master, parted with the property, and not merely with the possession. *Jackson's case*, 1 *Moody, C. C.* 119. *See Longstreeths's case, Id.* 137, *ante, p.* 488.

Proof of the things stolen—things savouring of the realty—at common law.] At common law larceny could not be committed of things that savoured of or adhered to the freehold, as trees, grass, bushes, bridges, stones, the lead of a house, or the like. 1 *Hale, P. C.* 510. 2 *East, P. C.* 587. But if these things be severed from the freehold, as wood cut, grass in cocks, stones dug out of a quarry, &c., then felony might be committed by stealing them, for then they are personal goods. So if a man came to steal trees, or the lead of a church, and severed it, and after about an hour's time came and fetched it away, this was held felony, because the act was not continued, but interpolated, and in that interval the property lodged in the right owner as a chattel; and so with regard to corn standing on the ground, for that is a chattel personal. 1 *Hale, P. C.* 510. "If," says Gibbs C. J., "a thief severs a copper and instantly carries it away, it is no felony at common law, yet if he lets it remain after it is severed, any time, then the removal constitutes a felony, if he comes back and takes it, and so of a tree which has been some time severed." *Lee v. Risdon*, 7 *Taunt.* 191.

The rule on this subject is thus stated by the criminal law commissioners: "Although a thing be part of the realty, or be any annexation to, or unsevered produce of the realty, yet if any person sever it from the realty with intent to steal it, after an interval, which so separates the acts of severance and removal, that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connexion with the realty. If any parcel of the realty or any annexation to, or unsevered produce of the realty be severed, otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after that severance." 1*st Rep. p.* 11.

To remedy the inconvenience which arose from this state of the law, it has been made larceny in certain cases to steal things

annexed to a part of the freehold. These enactments will now be stated.

Proof of things stolen—things savouring of the realty—things annexed to buildings, &c.] By 7 & 8 G. 4. c. 29. s. 44, it is enacted, that if any person shall steal, or rip, or cut, or break, with intent to steal any glass, or woodwork, belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil, or fixture, whether made of metal, or other material, respectively fixed in, or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny, and in case of any such thing being fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

Upon the repealed statute 4 G. 2. c. 32, it was held, that a person who procured possession of a house under a written agreement between him and the landlord, with a fradulent intention to steal the fixtures belonging to the house, was, in stealing the lead affixed to the house, guilty of a felony within the statute. *Munday's case*, 2 *Leach*, 850, 2 *East*, *P. C.* 594.

With regard to what shall be deemed *a building* within this act, it has been held (upon the statute 4 G. 2, which, after specifying certain buildings, uses the words, "any other building whatever,") that a summer-house, half a mile from the dwelling-house, is within the act. *Norris's case*, *Russ. & Ry.* 69. So upon the same statute a majority of the judges determined that a church was within the meaning of the act. *Parker's case*, 2 *East*, *P. C.* 592. But it was agreed that the property in lead affixed to a church could not be laid to be either in the churchwardens, or in the parishioners or inhabitants. *Id.* The new statute, by omitting to specify any particular building, and using only the words "any building whatsoever," has removed the doubts which gave rise to the above decisions.

Upon the words "any square, street or other place dedicated to public use or ornament," it has been held that a church-yard comes within the meaning of the act. *Per Bosanquet J. Blick's case*, 4 *C. & P.* 377.

Proof of the thing stolen—stealing from mines.] The stealing, or severing with intent to steal, the ore of any metal, &c. from a mine, is made felony by the 7 & 8 G. 4. c. 29. s. 37, by which it is enacted, that if any person shall steal, or sever with

intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

The following case was lately decided on the subject of larceny in mines. The prisoners were indicted for stealing copper-ore, the goods and chattels of A. B. and others. It appeared in evidence, that A. B. and others, were the lessees and adventurers in a mine, the ores in which were excavated by several distinct parties of labourers, working under separate contracts, and at different rates of wages, which were so much in the pound on the price of the ores when sold. The ores, when excavated, were left, by the men who dug them, in various heaps *in the mine*, and were afterwards raised to the surface, manufactured, and sold by and at the expense of the adventurers. The prisoners, who were contractors, working in the mine at wages of 5*s.* in the pound, had taken ores from a neighbouring heap which had been dug out by other contractors working at 2*s.* in the pound, and had placed them on their own heap, and there left them, to be raised and manufactured by the adventurers in the usual course. The prisoners having been convicted, on a point reserved, a majority of the judges were of opinion that the conviction was wrong, on the ground that there was no larceny *from the adventurers*, in whom the property was laid. *Webb's case, Cornwall Lent Ass.* 1835. *MS.*

Proof of the thing stolen—trees, &c.] The stealing of trees, &c. of greater value than 1*l.*, growing in certain situations, is made felony by the 7 & 8 Geo. 4. c. 29. s. 38, by which it is enacted, that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations herein-before mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds,) shall be guilty of felony, and, being

convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Upon the words "adjoining to a dwelling-house," it has been ruled, that they import actual contact, and therefore ground separated from the dwelling-house by a narrow walk and paling, with a gate in it, has been held not to be within their meaning. *Hodge's case, Moo. & Malk. N. P. C.* 341. There was no count, laying the trees to be growing in ground *belonging to* a dwelling-house. What is to be considered a garden, within this section, is a question for the jury. *Id.*

The stealing of trees, &c. of inferior value, is provided against by section 39, by which it is enacted, that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

The stealing of plants, fruits, and vegetable productions, growing in any garden, &c., is provided against by the 42d section of the same statute, by which it is enacted, that if any person shall steal, or shall destroy or damage, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall

seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

By the following section, this stealing of the same articles not growing in any garden, &c. is punishable only by summary conviction.

Proof of the things stolen—written instruments.] At common law, larceny could not be committed of deeds or other instruments concerning land. 1 *Hale, P. C.* 510. Thus it was held, that stealing a commission, directed to commissioners to ascertain boundaries, was not a felony, the commission concerning the realty. *Westbeer's case*, 1 *Leach*, 12, 2 *East, P. C.* 596, 2 *Str.* 1134. But the parchment, upon which the records of a court of justice are inscribed, if it do not relate to the realty, may be the subject of larceny. *Walker's case*, 1 *Moody, C. C.* 155. Bonds, bills, and notes, which concern mere choses in action, were also at common law held not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property *in possession* of the party from whom they are taken. 4 *Bl. Com.* 234; 2 *East, P. C.* 597. It was even held, that larceny could not be committed of the box in which charters concerning the land were held. 3 *Inst.* 109. 1 *Hale, P. C.* 510.

But now, by the various provisions of the 7 & 8 G. 4. c. 29, these offences are rendered felonies.

By section 21, if any person shall steal, or shall, for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award; and it shall not, in any indictment for such offence, be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.

By section 22, of that statute, if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or, for any fraudulent purpose, destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned, (*viz.* at the discretion of the Court, transportation beyond the seas for the term of seven years, or such other punishment by fine or imprisonment, or by both, as the Court shall award;) and it shall not, in any indictment for such offence, be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.

And by section 23, if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned, (*vide ante, p.* 503;) and in any indictment for such offence, it shall be sufficient to allege the thing stolen, to be evidence of the title, or of part of the title, of the person, or of some one of the persons, having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

By section 24, it is provided, that nothing in the act contained, relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment, to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any person, aggrieved by any such offence, might or would have had, if the act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Proof of the things stolen—choses in action—securities for money, &c.] The stealing of choses in action was provided against by statute 2 Geo. 2. c. 25. s. 3, which made it larceny

to steal any exchequer orders or tallies, or other orders entitling any person to any annuity or share in any parliamentary fund, or any exchequer bills, South Sea bonds, bank-notes, East India bonds, dividend warrants of the Bank, South Sea company, East India company, or any other company, society, or corporation, bills, bills of exchange, navy bills or debentures, goldsmiths' notes for the payment of money, or other bonds or warrants, bills or promissory notes, for the payment of any money being the property of any other person or persons, or of any corporation, notwithstanding any of the particulars were termed in law a chose in action. This statute is repealed, by the 7 & 8 G. 4. c. 27, except so far as such repeal may be considered as qualified by the 2d section of the act, which enacts, that nothing in the act contained shall affect or alter such part of any act as relates to the Post-office, or any branch of the public revenue, or to the naval, military, victualling, or other public stores of his Majesty, &c., except the acts of 31 Eliz. c. 4, and 22 Car. 2. c. 5, which are thereinbefore repealed, or shall affect or alter any act relating to the Bank of Scotland, or South Sea company. *See* 2 *Russell*, 144.

And now, by statute 7 & 8 G. 4. c. 29. s. 5, if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate, to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings' bank; or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom or of any foreign state; or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing: every such offender shall be deemed guilty of felony of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value, with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order; and each of the several documents thereinbefore enumerated, shall throughout the act be deemed for every purpose to be included under and denoted by the words valuable security.

Upon an indictment for stealing a bill of exchange, it appeared that when the bill was stolen from the prosecutor, at Manchester, there were the names of two indorsers only upon it; but when negociated by one of the prisoners at Leicester, the name of another indorser had been added. It was objected, that this being an indictment at Leicester, for *then* and *there* stealing a bill, whereon the names of A. B. and C. D. were

indorsed, it was not supported by evidence of a bill with the additional name of E. F. thereon, at the time of the negociation by the prisoner at Leicester. The judges, however, resolved that the addition of the third name made no difference; that it was the same bill as originally stolen, and that the prisoner was properly convicted. *Austin's case*, 2 *East*, P. C. 602.

Proof of property stolen—Promissory notes.—Where the indictment is for stealing a promissory note, the proof must support the description of the note in the indictment. The prisoner was indicted under the 2 G. 2. c. 25, for stealing "a certain note, commonly called a promissory note;" but the judges, on a case reserved, held the indictment wrong; that it was not sufficient to state it merely to be a *note*, the words of the statute being *bank note* or *promissory note* for payment of money, and they said that "commonly called a bank note" did not aid such originally wrong description. *Craven's case*, *Russ. & Ry.* 14. So also where the instrument was described as "a bank post bill." *Chard's case*, *Id.* 488.

The promissory notes of a banker, payable at his correspondent's in London, and, after payment there, stolen on their return to the country, have been held to be "promissory notes," within the meaning of the statute 7 G. 3. c. 50, (against secreting letters in the post-office.) Le Blanc, J. in delivering the resolution of the judges, said, the notes in point of form were strictly promissory notes, they remained uncancelled on the face of them, and as against the makers (the country bankers) they were valid and obligatory; so that into whose ever hands they might come for valuable consideration, they would be productive and available against the makers. *Ranson's case*, *Russ. & Ry.* 232, 2 *Leach*, 1090.

Whether the paid re-issuable notes of a banker can be properly described as *valuable securities*, does not appear to be well settled; the safe mode of describing them is to treat them as goods and chattels. The prisoner was indicted in several counts for stealing a number of promissory notes, and in others for stealing so many pieces of paper stamped with a stamp, &c. It appeared that the notes consisted of country bank notes, which, after having been paid in London, were sent down to the country to be re-issued, and were stolen on the road. It was objected that these were no longer promissory notes, the sums of money mentioned in them having been paid and satisfied, and that the privilege of re-issuing them, possessed by the bankers, could not be considered the subject of larceny. The judges however held, that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, and particularly the latter, being valuable to the owners. *Clark's case*, *Russ. & Ry.* 181, 2 *Leach*, 1036, 1 *Moody*, C. C. 222.

In a later similar case, where re-issuable bankers' notes

(paid in London) had been stolen from one of the partners on a journey, the prisoner having been convicted, upon an indictment charging him in different counts with stealing valuable securities called promissory notes, and also with stealing so many pieces of paper stamped with a stamp, &c., the judges held the conviction right. Some of them doubted whether the notes could properly be called "valuable securities;" but if not, they all thought they were goods and chattels. *Vyse's case*, 1 *Moody, C. C.* 218.

Lord Ellenborough is said to have ruled, that it was not a felony under 2 Geo. 2. c. 25. to steal bankers' notes which were completely executed, but which had never been in circulation, because no money was due upon them; *Anon.* 4 *Bl. Com. by Christian*, 234, (*n.*); but upon this decision it has been observed, that such notes would probably be deemed valuable property, and the subject of larceny at common law. 2 *Russell*, 147 (*n.*) *See Clark's case, and Vyse's case,* (*supra.*) If the halves of promissory notes are stolen, they should be described as goods and chattels. *Mead's case*, 4 *C. & P.* 535.

An incomplete bill of exchange or promissory note, is not as such a valuable security so as to be the subject of larceny. In consequence of seeing an advertisement, A. applied to the prisoner to raise money for him. The latter promised to procure 5000*l.*, and producing ten blank 10*s.* stamps, induced A. to write an acceptance across them. The prisoner then took them, without saying anything, and afterwards filled them up as bills of exchange for 500*l.* each, and put them into circulation. It was held, (at the Old Bailey) that these were neither "bills of exchange," "orders for the payment of money," "nor securities for money;" and that a charge of larceny for stealing the paper and stamps could not be sustained, the stamps and paper not being the property of A., or in his possession. *Hart's case*, 6 *C. & P.* 106. *See also Phipoe's case*, 2 *Leach*, 673, 2 *East, P. C.* 599, *stated post.*

Proof of the thing stolen—banker's checks.] A check upon a banker, drawn more than twenty miles from London, and not stamped, has been held not to be a *bill* or *draft*, within the 7 Geo. 3. c. 50; being of no value, nor in any way available. *Powley's case, Russ. & Ry.* 12. So a check on a banker, made payable to A. B., and not to bearer, not being stamped, has been decided by the judges not to be a valuable security within the meaning of the statute 7 & 8 Geo. 4. c. 29, the banker being subject to a penalty of 50*l.* by paying it. *Yates's case*, 1 *Moody, C. C.* 170.

Proof of the thing stolen—Exchequer bills.] The statute 2 Geo. 2. c. 25. mentioned exchequer bills by name, and under that statute it was held, that where the indictment charged the

prisoner with stealing "certain bills, commonly called Exchequer bills," and it appeared that they were signed by a person having no authority to sign them, they were misdescribed, and the prisoner was entitled to an acquittal. *Aslett's case, (first case)* 2 *Leach*, 954. But being afterwards indicted for stealing certain "securities" and "effects," the judges held that he was rightly convicted. *Id. (second case)* 958, 1 *Bos. & Pul. N. R.* 1.

Proof of the thing stolen—goods from vessels.] Various provisions are made by the statute 7 & 8 Geo. 4. c. 29, for the protection of goods in vessels.

By section 17, it is enacted, that if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal; or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek; every such offender, being convicted thereof, shall be liable to any of the punishments which the Court may award, as therein-before last mentioned. (Transportation for life, &c., sec. 14.)

And by section 18, if any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, shall suffer death as a felon: Provided always, that when articles of small value shall be stranded or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, it shall be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender may be indicted and tried either in the county in which the offence shall have been committed, or in any county next adjoining.

And by section 19, if any goods, merchandize, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search warrant, to be granted as therein-after mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay, over and above the value of the goods, merchandize, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem met.

By section 20, if any person offers shipwrecked goods for sale, they may be seized.

Proof of the thing stolen—goods in process of manufacture.] By statute 7 & G. 4. c. 29. s. 16, it is enacted, that if any person shall steal, to the value of ten shillings, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as thereinbefore last mentioned. (See section 14.)

Proof of the thing stolen—animals &c. domestic animals.] Of domestic cattle, as sheep, oxen, horses, &c., or of domestic fowls, as hens, ducks, geese, &c., and of their eggs, larceny may be committed at common law, for they are the subjects of property, and serve for food. 1 *Hale, P. C.* 511. *Hawk. P. C. b.* 1. *c.* 33, 843. And it being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animal. Thus milking cows at pasture, and stealing the milk, was held felony by all the judges. *Anon.* 2 *East, P. C.* 617. So pulling the wool from a sheep's back. *Martin's case, Id.* 618. But it must be understood in this as in the other instance, that the fact is done fraudulently and feloniously, and not merely from wantonness or frolic, *Id.* The stealing of a stock of bees, also seems to be admitted to be felony. *Tibbs v. Smith, T. Raym.* 33, 2 *East, P. C.* 607, 2 *Russell*, 151. The Scotch law corresponds with that of England in this respect, the stealing of bees *in a hive* being considered theft at common law, and the prosecutions for such thefts being very numerous. *Alison's Princ. Crim. Law of Scotland*, 280. *See also* 1*st Rep. Crim. Law Com. p.* 14.

Proof of the thing stolen—animals feræ naturæ.] Larceny cannot be committed of animals, in which there is no property, as of beasts that are *feræ naturæ* and unreclaimed, such as deers, hares, or conies in a forest, chase or warren, fish in an open river or pond, or wild fowl at their natural liberty, although any person may have the exclusive right, *ratione loci aut privilegii*, to take them, if he can in those places. 1 *Hale, P. C.* 511. 4 *Bl. Com.* 235, 6. 2 *East, P. C.* 607. So of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. 1 *Hale, P. C.* 511. So ferrets, though tame and saleable. *Searing's case, Russ. & Ry.* 350. So of rooks in a

rookery. *See Hannam v. Mockett*, 2 *B. & C.* 934, 4 *D. & R.* 518.

Proof of the things stolen—animals feræ naturæ—dead or reclaimed.] Where animals *feræ naturæ* are dead, reclaimed (and known to be so) or confined, and may serve for food, it is larceny at common law to take them. Thus deer inclosed in a park, fish in a trench or net, or as it should seem in any other place which is private property, and where they may be taken at the pleasure of the owner at any time, pheasants or partridges in a mew, young hawks in a nest or even old ones, or falcons reclaimed, and known by the party to be so. 1 *Hale, P. C.* 511. 2 *East, P. C.* 607. So of young pigeons in a dove-cote. 1 *Hale, P. C.* 511. And where pigeons were so far tame that they came home every night to roost in their boxes, after they had been out to feed, Taddy S. held them to be the subject of larceny. *Brooks's case*, 4 *C. & P.* 131. Of the eggs of hawks, or swans, though reclaimed, larceny cannot be committed; the reason of which is said to be, that a less punishment, namely, fine and imprisonment, is appointed by statute for that offence. 2 *East, P. C.* 607. 2 *Russell*, 151.

And when an animal *feræ naturæ* is killed, larceny may be committed of its flesh, as in the case of wild deer, pheasants, partridges, &c., for the flesh or skins are the subject of property. 3 *Inst.* 116. 1 *Hale, P. C.* 511.

An indictment for stealing a dead animal should state that it was dead, for upon a general statement that the party stole the animal, it is to be intended that he stole it alive. *Per Holroyd J. Edward's case, Russ. & Ry.* 498, *see Puckering's case, Lewin, C. C.* 302, *stated post.* So where the prisoner was indicted for stealing a pheasant, value 40s., of the goods and chattels of H. S., all the judges, after much debate, agreed that the conviction was bad; for in the case of larceny of animals *feræ naturæ*, the indictment must show that they were either dead, reclaimed, or confined, otherwise they must be presumed to be in their original state, and it is not sufficient to add "of the goods and chattels" of such a one. *Rough's case*, 2 *East, P. C.* 607.

Proof of the thing stolen—animals kept for pleasure only, and not fit for food.] There is, says Lord Coke, a distinction between such beasts as are *feræ naturæ*, and being made tame, serve for pleasure only, and such as, being made tame, serve for food, &c. 3 *Inst.* 110. Thus, although the owner may have a lawful property in them, in respect of which he may maintain an action of trespass, yet there are some things of which, in respect of the baseness of their nature, larceny cannot be committed, as mastiffs, spaniels, greyhounds, and blood-hounds; and other things, though reclaimed by art and industry, as

bears, foxes, ferrets, &c., and their whelps or calves, because though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c., which when made tame, serve for food. 1 *Hale, P. C.* 512. *Searing's case, Russ. & Ry.* 350, *ante, p.* 509. The rule with regard to animals *feræ naturæ* not fit for food, is said to include "bears, foxes, monkeys, apes, polecats, cats, dogs, ferrets, thrushes, singing birds in general, parrots, and squirrels." 1*st Rep. Crim. Law Com. p.* 14. The young of wild animals are also included. *Id.*

Before the late game act, it was held that it is not necessary that a person in the possession of *game*, which has been reclaimed, should be qualified in order to support an indictment laying the property in him. *Jones's case*, 3 *Burn. Just. tit. Larceny, p.* 84.

Proof of thing stolen—dogs, pigeons, &c.] By the 7 & 8 G. 4. c. 29. s. 31, if any person shall steal any dog, or shall steal any beast, or bird, ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the dog, beast, or bird, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding 12 calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

And by sec. 32, if any dog, or any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession, or on the premises of any person by virtue of a search warrant, to be granted as thereinafter mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof, and the person in whose possession or on whose premises the same shall be so found, such person knowing that the dog, beast, or bird has been stolen, or that the skin is the skin of a stolen dog, or beast, or that the plumage is the plumage of a stolen bird, shall on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment as persons convicted of stealing any dog, beast, or bird, are thereinbefore made subject to.

And by sec. 33, if any person shall unlawfully and wilfully kill, wound, or take any house-dove, or pigeon, under such circumstances as shall not amount to larceny at common law, every

such offender being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds.

Proof of the thing taken—identity.] Evidence must be given to show the identity of the property taken. But a resemblance between the article stolen and the article lost, will in some cases be sufficient without positive proof of the identity, as in the case of corn, or sugar stolen, &c. 2 *East, P. C.* 657. 2 *Russell*, 178.

Proof of the thing taken—value.] Evidence must be given that the thing stolen is of some value. *Phipoe's case*, 2 *Leach*, 680. But it is not necessary that the property should be of value to third persons, if valuable to the owner. Therefore a man may be convicted of stealing bankers' re-issuable notes, which have been paid. *Clarke's case*, 2 *Leach*, 1036, *Ranson's case*, *Id.* 1090, *Russ. & Ry.* 232, *ante*, *p.* 506. In certain statutory felonies, as stealing trees, &c., the article stolen must be proved to be of a certain value, *ante*, *p.* 501, and in other cases, as for stealing a will, (7 & 8 G. 4. c. 29. s. 22,) it is not necessary to allege the property to be of any value.

Proof of ownership — cases where it is unnecessary to allege or prove ownership.] In some cases, in consequence of the provisions of certain statutes, it is unnecessary either to allege or prove the ownership of the property stolen, as upon an indictment upon the repealed statute 4 G. 2. c. 32, (see 7 & 8 G. 4. c. 29. s. 44,) in which many of the judges thought that the right way of laying the case was, to allege the lead to have been fixed to a certain building, &c., without stating the property to be in any one. *Hickman's case*, 2 *East*, *P. C.* 593. So by 7 & 8 G. 4. c. 29. s. 22, upon an indictment for stealing a will, &c., it shall not be necessary to allege that such will, &c. is the property of any person, or that the same is of any value, and the same with regard to stealing records, &c., sec. 21.

Proof of the ownership—intermediate tortious taking.] It is an established and well known rule of law that the possession of the true owner of goods cannot be devested by a tortious taking; and, therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the true owner. *Per Gould J. delivering the opinion of the judges*, *Wilkins's case*, 1 *Leach*, 522. If A., says Lord Hale, steal the horse of B., and after C. steals the same horse from A., in this case C. is a felon, both as to A. and B., for by

the theft by A., B. lost not the property, nor in law the possession of his horse, and therefore C. may be indicted for felony in taking the horse of B. 1 *Hale, P. C.* 507. But if A. steals the horse of B., and afterwards *delivers it* to C., who was no party to the first stealing, and C. rides away with it, *animo furandi*, yet C. is no felon to B., because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it, neither is he a felon to A., for he had it by his delivery. *Ibid.* The doctrine as to property not being changed by felony, holds also with regard to property taken by *fraud*, for otherwise a man might derive advantage from his own wrong. *Per Gould J.* 1 *Leach*, 523. *Noble v. Adams*, 7 *Taunt.* 39. *Kelby v. Wilson, Ry. & Moo. N. P. C.* 178. *Irving v. Motly*, 7 *Bingh.* 543.

Proof of ownership—of goods in custodia legis.] Goods seized by the sheriff under a *fi. fa.* remain the property of the defendant until a sale. *Lucas v. Nockells*, 10 *Bingh.* 182. A sheriff's officer seized goods under a *fi. fa.* against J. S., and afterwards stole part of them. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff; but upon the point being saved, the judges held that notwithstanding the seizure, the general property remained in J. S., and the loss would fall upon him if they did not go to liquidate the debt; that the seizure left the debt as it was, and that the whole debt continued until the goods were applied to its discharge. *Eastall's case*, 2 *Russell*, 158.

Proof of ownership—goods of the offender himself.] Under certain circumstances a man may be guilty of larceny in stealing his own goods, or of robbery in taking them by violence from the person of another. And he may likewise be accessory after the fact to such larceny or robbery, by harbouring the thief, or assisting his escape. These cases arise where the property is in the temporary possession of another person, from whence the owner takes them with a fraudulent intent. Thus where A. delivers goods to B. to keep for him, and then steals them, with intent to charge B. with the value of them, this is felony in A. 1 *Hale, P. C.* 513, 514. *Foster*, 123. 2 *East, P. C.* 558. And if A. having delivered money to his servant to carry, disguises himself, and robs him on the road, with intent to charge the hundred, this is undoubtedly robbery in A. *Foster*, 123, 124. 4 *Bl. Com.* 231. And there seems to be no objection in such case to laying the property in the servant. 2 *East, P. C.* 654. Goods were placed in the hands of lightermen for the purpose of getting them passed at the customs, and conveyed on board ship. In order to defraud the government of the

duties, the owner of the goods secretly abstracted them from the possession of the lighterman. The owner being convicted of larceny, upon a case reserved, seven of the judges held it to be a larceny, because the lightermen had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully, and against their will, was a felonious intent, as against them, because it exposed them to a suit upon the bond given to the customs. In the opinion of some of the seven judges, it would have been larceny, although there had been no felonious intent against the lightermen, but only an intention to defraud the crown. Four of the judges doubted whether it was larceny, because there was no intent to cheat or charge the lightermen, but only an intention to defraud the crown. *Wilkinson's case, Russ. & Ry.* 470.

Upon the same principle, although the part owner of goods cannot in general be guilty of larceny with regard to the other part owners, yet if the property be in the possession of a person who is responsible for its safety, and a part owner take it out of his possession, under such circumstances as would in ordinary cases constitute a larceny, it is a felony. Thus where a box belonging to a benefit society, was deposited with the landlord of a public house, who, by the rules of the society, was answerable for its safety, and a member of the society broke into the house, and carried away the box, being convicted of the larceny, the judges on a case reserved were clear, that as the landlord was answerable to the society for the property, the conviction was right. *Bramley's case, Russ. & Ry.* 478.

Proof of ownership — goods of joint tenants, tenants in common, and partners.] In general a party having a right of property in goods, and also a right to the possession, cannot be guilty of larceny with respect to such goods. Tenants in common, therefore, and joint tenants cannot be guilty of stealing their common goods. 1 *Hale, P. C.* 513. 2 *East, P. C.* 558.

Difficulties often arising with regard to the proof of the names of all the partners laid in an indictment, the following enactment was made for the purpose of removing the inconvenience.

By the 7 G. 4. c. 64. s. 14, in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, it is enacted, that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named,

and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and the provision shall be construed to extend to all joint stock companies and trustees.

Proof of ownership—goods in possession of children.] Clothes and other necessaries, provided for children by their parents, are often laid to be the property of the parents, especially where the children are of tender age; but it is good either way. 2 *East, P. C.* 654. 2 *Russell,* 160. In a case, at the Old Bailey, in 1701, it was doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, an ancient clerk in court, said that it had always been usual to lay it to be the goods of the child in such case, and that many indictments, which had laid them to be the property of the father, had been ordered to be altered by the judges. 2 *East, P. C.* 654. Where a son, nineteen years of age, was apprenticed to his father, and, in pursuance of the indentures of apprenticeship, was furnished with clothes by the father, it was held that the clothes were the property of the son exclusively, and ought not to have been laid in the indictment to be the property of the father. *Forsgate's case,* 1 *Leach,* 463.

Proof of ownership—goods in possession of bailee.] Any one, who has a special property in goods stolen, may lay them to be his in an indictment, as a bailee, pawnee, lessee for years, carrier, or the like; *a fortiori,* they may be laid to be the property of the respective owners, and the indictment is good either way. But if it appear in evidence that the party, whose goods they are laid to be, had neither the property nor the possession, (and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master,) the prisoner ought to be acquitted on that indictment. 1 *Hale, P. C.* 513. 2 *East, P. C.* 652. Many cases have been decided on this principle.

Goods stolen from a *washer-woman,* who takes in the linen of other persons to wash, may be laid to be her property; for persons of this description have a possessory property, and are answerable to their employers, and could all maintain an appeal of robbery or larceny, and have restitution. *Packer's case,* 2 *East, P. C.* 653, 1 *Leach,* 357. (*n.*)

So an *agister,* who only takes in sheep to agist for another, may lay them to be his property, for he has the possession of them, and may maintain trespass against any who takes them away. *Woodward's case,* 2 *East, P. C.* 653, 1 *Leach,* 357. (*n.*)

A *coach-master*, in whose coach-house a carriage is placed for safe custody, and who is answerable for it, may lay the property in himself. *Taylor's case*, 1 *Leach*, 356. So where a glass was stolen from a lady's chariot, which had been put up in a coach-yard, at Chelsea, while the owner was at Ranelagh, the property was held to be properly laid in the master of the yard. *Statham's case, cited* 1 *Leach*, 357.

Goods at *an inn*, used by *a guest*, where stolen, may be laid to be either the property of the innkeeper or the guest. *Todd's case*, 2 *East*, *P. C.* 653.

Where the *landlord of a public-house* had the care of a box belonging to a benefit society, and, by the rules, he ought to have had a key, but in fact had none, and two of the stewards had each a key; the box being stolen, upon an indictment, laying the property in the landlord, Parke J. held that there was sufficient evidence to go to the jury of the property being in the landlord alone. *Wymer's case*, 4 *C. & P.* 391.

Proof of ownership—bailee—goods in possession of carriers—drivers of stage-coaches, &c.] Carriers, as bailees of goods, have such a possession as to render an indictment, laying the property in them, good. *Ante, p.* 515. And so it has been held, with regard to the driver of a stage-coach. The prisoner was indicted for stealing goods, the property of one Markham. The goods had been sent by the coach driven by Markham, and had been stolen from the boot on the road. The question was, whether the goods were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for any thing stolen; and it not appearing that he had been guilty of any laches. Upon a case reserved, the judges were of opinion that the property was rightly laid in Markham; for though, as against his employers, he, as driver, had only the bare charge of the property committed to him, and not the legal possession, which remained in his masters, yet, as against all the rest of the world, he must be considered to have such a special property therein as would support a count, charging them as his goods; for he had, in fact, the possession of and control over them; and they were intrusted to his custody and disposal during the journey. They said that the law, upon an indictment against the driver of a stage-coach, *on the prosecution of the proprietors*, considers the driver to have the *bare charge* of the goods belonging to the coach; but, on a charge *against any other person*, for taking them tortiously and feloniously out of the driver's custody, *he* must be considered as the possessor. *Deakin's case*, 2 *Leach*, 862, 876, 2 *East*, *P. C.* 653.

Proof of ownership—goods of deceased persons, executors, &c.] Where a person dies intestate, and the goods of the deceased are

stolen before administration granted, the property must be laid in the ordinary; but if he dies, leaving a will, and making executors, the property may be laid in the executor, though he has not proved the will; and it is not necessary that the prosecutor should name himself ordinary or executor, because he proceeds on his own possession. 1 *Hale, P. C.* 514. 2 *East, P. C.* 652.

There can be no property in a dead corpse, and though a high misdemeanor, the stealing of it is no felony. A shroud stolen from the corpse must be laid to be the property of the executors, or of whoever else buried the deceased. So the coffin may be laid to be the goods of the executor. But if it do not readily appear who is the personal representative of the deceased, laying the goods to be the goods of a person unknown is sufficient. 2 *East, P. C.* 652. 2 *Russell*, 163.

In some cases, the property of an intestate has been held to be rightly described as being in the party in actual possession, no administration having been granted. D. and C. were partners; C. died intestate, leaving a widow and children. From the time of his death, the widow acted as partner with D., and attended to the business of the shop. Three weeks after his death, part of the goods were stolen, and were described in the indictment as the goods of D. and the widow. It was contended, that the names of the children, as next of kin, should have been joined, or that the property should have been laid in D. and the ordinary; but Chambre J. held that actual possession, as owner, was sufficient, and the judges, on a case reserved, were of the same opinion. *Gaby's case, Russ & Ry.* 178. So where a father and son carried on business as farmers, and the son died intestate, after which the father carried on the business for the joint benefit of himself and the son's next of kin; some of the sheep being stolen, and being laid as the property of the father and next of kin, the judges, on a case reserved, held the indictment right. *Scott's case, Russ. & Ry.* 13.

Proof of ownership—goods of lodger.] Where a room, and the furniture in it, are let to a lodger, he has the sole right to the possession, and if the goods are stolen, it has been held, in two cases, by the judges, that the property must be laid in the lodger. *Belstead's case, Russ. & Ry.* 411. *Brunswick's case*, 1 *Moody, C. C.* 26.

Proof of ownership—goods of married women.] Where goods, in the possession of a married woman, are stolen, they must not be described as her property, but as that of her husband; for her possession is his possession. 2 *East, P. C.* 652. *See French's case, Russ. & Ry.* 491, *Wilford's case, Id.* 517, *stated.* Where the goods of a *feme sole* are stolen, and she afterwards marries, she may be described by her maiden name. *Turner's case*, 1 *Leach*, 536.

Proof of ownership—goods of persons unknown.] Felony may be committed in stealing goods, though the owner is not known, and they may be described in the indictment as the goods of a person to the jurors unknown; and the king is intitled to them. 1 *Hale, P. C.* 512. 2 *East, P. C.* 651. But if the owner be really known, an indictment, alleging the goods to be the property of a person unknown, is improper, and the prisoner must be discharged upon that indictment. 2 *East, P. C.* 651. *See Walker's case,* 3 *Campb.* 264, *Bush's case, Russ. & Ry.* 372, *stated, ante, p.* 80. In prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino;* it is not enough that the prisoner is unable to give a good account how he came by the goods. 2 *East, P. C.* 651. 2 *Hale, P. C.* 290.

An indictment for plundering a wreck contained two counts. The first count stated the property in the ship to be in certain persons named; the second, in persons unknown. The witness for the prosecution could not recollect the christian name of some of the owners. The counsel for the crown then relied upon the second count, but Richards C. B. said, "I think the prisoner must be acquitted. The owners, it appears, are known, but the evidence is defective on the point. How can I say that the owners are unknown?" *Robinson's case, Holt's N. P. C.* 596.

Proof of ownership—goods of servants.] In general, the possession of a servant is the possession of the master, the servant having merely the charge and custody of the goods; and in such case, the property must be laid in the master and not in the servant. 2 *East, P. C.* 652. 2 *Russell,* 158. Upon an indictment for stealing goods from a dissenting chapel, laying the property in one Evans, it appeared that Evans was the servant of the trustees of the chapel; that he had a salary of 5*l.* a year, with the care of the chapel, and the things in it, to clean and keep in order; that he held the only key of the chapel, but that the minister had a key of the vestry, through which he might enter the chapel. Upon a case reserved, the judges were of opinion that the property of the goods taken could not be considered as belonging to Evans. *Hutchinson's case, Russ. & Ry.* 412. But in some cases, as against third persons, a party who, as against his employer, has the bare *charge* of goods, may be considered as having the possession, as in the case of the driver of a stage-coach. *Ante, p.* 516. So where the owner of goods steals them from his own servant, with intent to charge him with the loss, the goods may, as already stated, be described as the property of the servant. *Ante, p.* 513.

Proof of ownership—of corporations.] Where goods are the property of a company of persons not incorporated, they must

be described as the goods of the individuals, or of some one of the individuals and others. 1 *Russ.* 164. But by statute 7 G. 4. c. 64. s. 20, judgment shall not be stayed or reversed on the ground that any person or persons mentioned in an indictment or information, is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names.

The goods of a corporation must be described as their goods, by their corporate name. Where in an indictment the goods were laid to be the property of A. B. C. D., &c. they the said A. B. C. D., &c. being the churchwardens of the parish church; and it appeared that the churchwardens were incorporated by the name of "the churchwardens of the parish church of Enfield," the court (at the Old Bailey), held the variance fatal. They said that where any description of men are directed by law to act in a corporate capacity, their natural and individual capacity, as to all matters respecting the subject of their incorporation, is totally extinct. If an action were brought in the private names of the prosecutors, for any matter relating to their public capacity, they must unavoidably be nonsuited, and *a fortiori* it must be erroneous in a criminal prosecution. *Patrick's case*, 1 *Leach*, 252. But where trustees were appointed by act of parliament (but not incorporated), for providing a workhouse, and property stolen from them was laid to be the property of "the trustees of the poor of," &c. without naming them, the court (at the Old Bailey), held it wrong; for as the act had not incorporated the trustees, and by that means given them collectively a public name, the property should have been laid as belonging to A. B., &c. by their proper names, and the words "trustees of the poor of," &c. subjoined as a description of the capacity in which they were authorized by the legislature to act. *Sherrington's case*, 1 *Leach*, 513. On the authority of this case, the following was decided:— By statute 24 G. 3. c. 15, certain inhabitants in seven parishes were incorporated by the name of "the guardians of the poor of," &c. Twelve directors were to be appointed out of the guardians, and the property belonging to the corporation was vested in "the directors for the time being," who were to execute the powers of the act. The prisoner was indicted for embezzling the monies of the "directors of the poor of," &c. The judges, on a case reserved, held that the money should have been laid, either as the money of the guardians of the poor, by their corporate name, or of the directors for the time being, by their individual names. *Beacall's case*, 1 *Moody, C. C.* 15. *See Jones and Palmer's case*, 1 *Leach*, 366, 2 *East, P. C.* 91, *ante*, p. 401, 402.

A bible had been given to a society of Wesleyan Dissenters, and was bound at the expense of the society. There did not appear to be any trust deed. The bible having been stolen, the

indictment charged the property to be in A. and others. A. was a trustee of the chapel and a member of the society. Parke, J. held the indictment right. *Boulton's case*, 5 *C. & P.* 537.

Proof of the ownership—goods belonging to counties, &c.] By the 7 G. 4. c. 64. s. 15, with respect to the property of counties, ridings, and divisions, it is enacted, that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants.

Proof of the ownership—goods for the use of the poor of parishes.] By the 7 G. 4. c. 64. s. 16, with respect to the property of parishes, townships, and hamlets, it is enacted, that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poorhouse, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements, provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necsssary to specify the name or names of any such surveyor or surveyors.

Proof of ownership—goods, &c. of trustees of turnpikes.] By statute 7 G. 4. c. 64. s. 17, with respect to property under

turnpike trusts, it is enacted, that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.

Proof of ownership—goods, &c. of commissioners of sewers.] By statute 7 G. 4. c. 64. s. 18, with respect to property under commissioners of sewers, it is enacted, that in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management any such things shall be, and it shall not be necessary to specify the names of any of such commissioners.

Venue.] An indictment for larceny must be tried in the county in which the offence was, either actually, or in contemplation of law, committed. But where goods stolen in one county are carried by the offender into another, or others, he may be indicted in any of them, for the continuance of the asportation is a new caption. 1 *Hale, P. C.* 507. 4. *Bl. Com.* 305. 1 *Moody, C. C.* 47. (*n.*) The possession still continuing in the owner, every moment's continuance of the trespass is as much a wrong, and may come under the word *cepit*, as much as the first taking. *Hawk. P. C. b.* 1. *c.* 19. *s.* 52. Though a considerable period elapse between the original taking and the carrying them into another county, the rule still applies; as where property was stolen on the 4th November, 1823, in Yorkshire, and carried into Durham on the 17th March, 1824. *Parkin's case*, 1 *Moody, C. C.* 45. This rule does not, however, hold with regard to compound larcenies, in which case the prisoner can only be tried for simple larceny in the second county. Thus where the prisoner robbed the mail of a letter, either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted on the statutes 5 G. 2. c. 25, and 7 G. 3. c. 40, the judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail. *Thompson's case*, 2 *Russell*, 174. So if A. robs B. in the county of C., and carries the goods into the county of D., A. cannot be convicted of robbery

in the latter county, but he may be indicted of larceny there. 2 *Hale, P. C.* 163.

If the thing stolen be altered in its character in the first county, so as to be no longer what it was when it was stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. 2 *Russell*, 174. *See Edward's case, Russ. & Ry.* 497. Thus an indictment in the county of H. for stealing "one brass furnace," is not supported by evidence that the prisoner stole the furnace in the county of R., and there broke it to pieces, and brought the pieces into the county of H. *Halloway's case*, 1 *C. & P.* 127.

If the original taking be such of which the common law cannot take cognizance, as where the goods are stolen at sea, the thief cannot be indicted for larceny in any county into which he may carry them. 3 *Inst.* 113, 2 *Russell*, 175. And so where the goods are stolen abroad, (as in Jersey,) carrying them into an English county will not render the offender indictable there. *Prowes's case*, 1 *Moody, C. C.* 349. The case of property stolen in any one part of the united kingdom, and carried into any other part, is provided for by stat. 7 & 8 G. 4. c. 29. s. 76, which enacts, that if any person, having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever, in any one part of the united kingdom, shall afterwards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the united kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part.

A joint original larceny in one county may become a separate larceny in another. Thus where four prisoners stole goods in the county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in separate bags, it was ruled by Holroyd J. that the joint indictment against all the prisoners could not be sustained as for a joint larceny in the county of Worcester; and he put the counsel for the prosecution to his election as to which of the prisoners he would proceed against. *Barnett's case*, 2 *Russell*, 174. But where a larceny was committed by two, and one of

them carried the stolen goods into another county, the other still accompanying him, without their ever having been separated, they were held both indictable in either county, the possession of one being the possession of both in each county, as long as they continued in company. *M'Donagh's case, Carr. Suppl.* 23, 2*d. ed.*

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. The prisoners, County and Donovan, laid a plan to get some coats from the prosecutrix under pretence of buying them. The prosecutrix had them in Surrey at a public house, the prisoners got her to leave them with Donovan, whilst she went with County, that he might get the money to pay for them. In her absence Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was against both in Middlesex, and upon a case reserved, the judges were unanimous that as County was present aiding and abetting in Surrey, at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in Middlesex. They therefore held the conviction right. *County's case,* 2 *Russell,* 175.

See further as to Venue, title "*Venue,*" *ante, p.* 185.

LIBEL.

Blasphemous libels—at common law . . . 524
Statutes 524
Indecent libels 525
Libels on government 525
Libels on the administration of justice . . 526
Libels on individuals 526
Proof of introductory averments . . . 528
Proof of publication—in general . . . 529
Of libels in newspapers . . . 531
By admission of defendant . . . 533
Constructive publication . . . 533
Proof of innuendo 535
Proof of malice 536

Proof of intent 537
Venue 537
Proof for the defendant 538
Statute 32 *G.* 3. *c.* 60 . . . 541

Blasphemous libels — at common law.] All blasphemies against God, or the Christian religion, or the Holy Scriptures, are indictable at common law, as also are all impostors in religion, such as falsely pretend extraordinary missions from God, or terrify or abuse the people with false denunciations of judgment. In like manner all malicious revilings, in public derogation and contempt of the established religion, are punishable at common law, inasmuch as they tend to a breach of the peace. 1 *East, P. C.* 3. 1 *Russell,* 217. So it has been held that to write against Christianity in general is clearly an offence at common law, but this rule does not include disputes between learned men on particular controverted points, but only refers to those cases where the very root of Christianity itself is struck at. *R. v. Woolston, Fitzgib.* 66, 2 *Str.* 834.

With regard to the boundary of the rule regulating the discussion of religious topics, it is observed by Mr. Starkie, that a malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals. a state of apathy and indifference to the interests of society is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy, or even to weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete. 2 *Starkie on Slander,* 147, 2*d ed.* Upon an indictment for alleging that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman inquiring whether a work denying the divinity of our Saviour was a libel; Abbott, C. J. stated that a work speaking of Jesus Christ in the language here used was a libel, and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer to the question put, the Court of King's Bench held the answer correct. *Waddington's case,* 1 *B. & C.* 26.

Blasphemous libel—statutes.] By statute 1 Ed. 6. c. 1, persons reviling the sacrament of the Lord's supper, are punishable by imprisonment. By stat. 1 Eliz. c. 2, *ministers* and

others speaking in derogation of the book of common prayer, are punishable as therein mentioned. The 1 W. 3. c. 18. s. 17, against denying the doctrine of the Trinity, was repealed by the 53 G. 3. c. 160. The statute of W. 3. has been held not to affect the common law offence, being cumulative only. *Carlile's case*, 3 *B. & A.* 161. *Waddington's case*, 1 *B. & C.* 26.

Indecent libels.] Although an opinion formerly prevailed, that the publication of an obscene or indecent writing not containing reflections upon any individual, was not an indictable offence, *Hawk. P. C. b.* 2. *c.* 73. *s.* 9, yet a different rule has been since established, and it is now clear that an indictment at common law may be maintained for any offence which is against public morals or decency. *Sedley's case*, *Sid.* 168. *Wilkes's case*, 4 *Burr.* 2530. *Holt on Libel*, 73, 2*d ed.* Under this head may be comprehended every species of representation, whether by writing, by painting, or by any manner of sign, or substitute, which is indecent and contrary to public order. *Holt, ubi supra.* The principle of the cases also seems to include the representation of obscene plays, an offence which has formed the ground of many prosecutions. 2 *Stark. on Slander*, 159, 2*d ed. Holt*, 73. 1 *Russell*, 220.

Libels on the government.] The result of the numerous cases respecting libels on the government, is thus given by Mr. Starkie: "It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; where this boundary is overstepped, and the limit abused for wanton gratification or private malice, in aiming a stab at the private character of a minister, under colour and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy or contumely, under pretence of exposing defects or correcting errors, but in reality for the purpose of impeding or obstructing the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution: in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal." 2 *Stark. on Slander*, 183, 2*d ed.* The test with regard to libels of this description proposed by Mr. Starkie, and adopted by another eminent text-writer is this: "Has the communication a plain tendency to produce public

mischief, by perverting the mind of the subject, and creating a general dissatisfaction towards government ?" 1 *Russell*, 224. *See also Lambert's case*, 2 *Campb.* 398. *Tuchin's case*, *Holt R.* 424, 5 *St. Tr.* 583. *Holt on Libel*, 88, 89.

Libels on the administration of justice.] Where a person, either by writing, by publications in print, or by any other means, calumniates the proceedings of a court of justice, the obvious tendency of such an act is to weaken the administration of justice, and consequently to sap the very foundations of the constitution itself. *Per Buller J. Watson's case*, 2 *T. R.* 199. It certainly is lawful, with decency and candour to discuss the propriety of the verdict of a jury, or the decisions of a judge, but if the writing in question contain no reasoning or discussion, but only declamation and invective, and is written, not with a view to elucidate the truth, but to injure the character of individuals, and to bring into hatred and contempt the administration of justice, such a publication is punishable. *Per Grose J. White's case*, 1 *Campb.* 359.

Libels upon individuals.] A libel upon an individual is defined by Hawkins to be a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one that is dead, or the reputation of one that is alive, and expose him to public hatred, contempt or ridicule. *Hawk. P. C. b.* 2. *c.* 73. *s.* 1. Though the words impute no punishable crime, yet if they contain that sort of imputation which is calculated to vilify a man and to bring him into hatred, contempt, and ridicule, an indictment lies. *Per Mansfield C. J. Thorley v. Lord Kerry*, 4 *Taunt.* 364. *Digby v. Thompson*, 4 *B. & Ad.* 821. No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types or figures, the act by the law of England is a libel. *Per Lord Ellenborough*, *Cobbett's case*, *Holt on Lib.* 114, 2*d ed.* Thus an information was granted against Dr. Smollett for a libel in the Critical Review upon Admiral Knowles, insinuating that he wanted courage and veracity, and tending to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. *Smollett's case*, *Holt on Lib.* 224. (*n.*) So an information was granted against the printer of a newspaper for a ludicrous paragraph, giving an account of the Earl of Clanricard's marriage with an actress at Dublin, and of his appearing with her in the boxes with jewels, &c. *Kinnersley's case*, 1 *W. Bl.* 294. And for a libel on the Bishop of Durham, contained in a paragraph, which represented him as "a bankrupt." *Anon. K. B. Hil. T.* 1819. *Holt on Lib.* 224. (*n.*) 2*d ed.*

It is extremely difficult to define the boundaries beyond which reflections upon the character of an individual are commonly cognizable. It is said by Mr. Holt, that where there is no imputation on the moral character, no words of ridicule or contempt, and nothing which can affect the party's reception in life, it is no libel, and he illustrates this position by the following case. The alleged libel was this:—"The Rev. John Robinson, and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." This libel was published in the Cassino room at Southwold, by posting it on a paper. It was held that the paper and mode of promulgating it did not amount to a libel. 1st, Because it did not, by any necessary or probable implication, affect the moral fame of the party. 2dly, That it was the regulation of a subscription assembly, and the paper might import no more than that the party was not a social and agreeable character in the intercourse of common life. 3dly, That the words charged him with nothing definite, threw no blemish on his reputation, and implied no unfitness for general society." *Robinson v. Jermyn*, 1 *Price*, 11. *Holt on Libel*, 218, 2*d ed.*

With regard to libels on the memory of persons deceased, it has been held, that a writing reflecting on the memory of a dead person, not alleged to be published with a design to bring scandal or contempt on the family of the deceased, or to induce them to break the peace, is not punishable as a libel. *Topham's case*, 4 *T. R.* 127, *and see Taylor's case*, 3 *Salk.* 198. *Holt on Lib.* 230, 2*d ed.*

A libel upon a foreigner is indictable. Thus, Lord George Gordon was found guilty upon an information for a libel on the Queen of France; 2 *Stark. on Slander*, 217, 2*d ed.*; and informations have also been granted for libels upon the characters of the Emperor of Russia, and of Napoleon. *Id.* In the latter case, Lord Ellenborough appears to have considered the situation of the individual as forming the ground of the decision. "I lay it down as law," he says, "that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the amity and peace between the two countries."

It is not necessary that the libel should reflect upon the character of any particular individual, provided it immediately tend to produce tumult and disorder; 2 *Stark. on Slander*, 213, 2*d ed.*; although the contrary was formerly held. *Hawk. P. C. b.* 1. *c.* 28. *s.* 9. Thus an information was granted for a libel, containing an account of a murder of a Jewish woman and child, by certain Jews lately arrived from Portugal, and the affidavits set forth, that certain persons recently arrived from Portugal had been attacked by the mob and barbarously treated

in consequence of the libel. *Osborne's case, Sess. ca.* 260. *Barnard. K. B.* 138, 166. Informations at the suit of public bodies upon the application of individuals presiding over them, have been frequently granted by the Court of King's Bench. *Campbell's case, Bell's case, Holt on Lib.* 240, 2*d ed. Williams's case,* 5 *B. & A.* 595.

Proof of introductory averments.] Where the indictment contains introductory averments, inserted for the purpose of explaining and pointing the libel, such averments must be proved as laid. It frequently happens that the libel is directed against the prosecutor in a particular character, and an intent to libel him in that character is averred. In such case, it must be made to appear, that the prosecutor bore that character. But in general where the character is a public one, it will be sufficient if it appear that the prosecutor has acted in it, and it will not be necessary to give strict evidence of his appointment, *ante, p.* 7. *& p.* 14. Thus, if the indictment allege that the prosecutor was at the time of the supposed injury, a magistrate, or a peace officer, it is sufficient to show that he previously acted as such. *Berryman v. Wise,* 4 *T. R.* 366. 2 *Stark. on Slander,* 2, 2*d ed.*

Whether a person practising as a physician, and libelled in his character as such, was bound to prove, by strict evidence, the introductory averment that he was a physician, was long a matter of doubt. In a case at *Nisi Prius,* Buller, J. required such proof to be given; *Pickford v. Gutch,* 1787, 2 *Stark. on Slander,* 3, (*n.*) 2*d ed.*; but in a subsequent case, the Court of Common Pleas was equally divided upon the point. *Smith v. Taylor,* 1 *N. R.* 196. It has, however, been decided by the Court of King's Bench, in a very late case, that to support an averment that the party was a physician, it is necessary to give regular evidence that he possessed lawful authority to practice as such, and that proof of his in fact practising as such is insufficient. *Collins v. Carnegie,* 1 *Adol. & Ell.* 695, 2 *Nev. & M.* 703.

Where the indictment specifies the particular mode in which the party was invested, with the particular character in which he has been injured, it will, as it seems, be necessary to prove such a descriptive allegation with all its circumstances, although a more general allegation would have been sufficient; for though a totally irrelevant allegation may be rejected as surplusage, one which is material and descriptive of the legal injury must be proved as laid. 2 *Stark. on Slander,* 8, 2*d ed.*

In all cases where the libel itself is an admission of the particular character alleged. further proof of such particular character is unnecessary. Thus where, in an action for words spoken of the plaintiff, as an attorney, it appearing that they contained a threat to have the plaintiff struck off the roll of attornies, it was held unnecessary to give any proof of the

plaintiff's professional character. *Berryman v. Wise*, 4 *T. R.* 366. So where the words were, "He is a pettifogging, blood-sucking attorney." *Armstrong v. Jordan, cor. Hullock*, 2 *Stark. on Slander*, 11 (*n.*) 2*d ed.* Where the declaration alleged that the plaintiff held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, and the alleged libel treated the plaintiff as holding an office of public trust, and charged him with not having given a proper account of the public property, the libel itself was held to be evidence of the introductory averment, though the plaintiff's own witnesses proved that the office was *not* one of trust and confidence, and that he was not trusted with the receipt of money. *Bagnall v. Underwood*, 11 *Price*, 621.

In the same manner where the libel admits any other of the introductory averments, such averments need not be proved. Where the declaration averred that the plaintiff had been appointed envoy by certain persons exercising the powers of government in the republic or state of Chili, in South America, the libel stating that the plaintiff had colluded to obtain money in the matter of a loan, for the republic or state of Chili, was held to be sufficient proof of the existence of such a state. *Yrisarri v. Clement*, 3 *Bingh.* 432. So where a libel alleged that certain acts of outrage had been committed, and there was a similar introductory averment, it was held that the latter required no proof. *Sutton's case*, 4 *M. & S.* 548. If an introductory averment be immaterial, it may be rejected as surplusage, and need not be proved; and, in general, where it is not matter of description, it is divisible, and part of it only may be proved. *Vide, ante, p.* 74.

The averment that the libel was published "of and concerning" the prosecutor, or "of and concerning" the particular matters averred, must be proved as laid.

The declarations of spectators, while viewing a libellous picture, publicly exhibited in an exhibition room, were admitted by Lord Ellenborough, as evidence to show that the figures pourtrayed were meant to represent the parties alleged to have been libelled. *Dubois v. Beresford*, 2 *Campb.* 512.

Proof of publication in general.]—All who are concerned in publishing a libel are equally guilty of a misdemeanor; *Bac. Ab. Libel*, (*B.*) 1 *Russell*, 234; but the writing or composing a libel, without a publication of it, is not an offence. The mere writing a defamatory libel, which the party confines to his own closet, and neither circulates nor reads to others, is not punishable. *Paine's case*, 5 *Mod.* 165, 167. So the taking a copy of a libel is not an offence, unless the person taking the copy publishes it. *Com. Dig. Libel*, (*B.* 2.) The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as

fact, and it is a question for the court in doubtful cases, whether the facts when proved constitute a publication in point of law. 2 *Stark. on Slander*, 311, 2*d ed.*

With regard to the acts which constitute a publication, it has been held that a man who acts as servant to the printer of the libel, and claps down the press, is punishable, though it do not appear that he clearly knew the import of the libel, or that he was conscious he was doing any thing wrong. *Clark's case*, 1 *Barnard.* 304. To this decision, however, Mr. Serjeant Russell has with much reason added a *quære.* 1 *Russell*, 234. Production of a libel, and proof that it is in the hand-writing of the defendant, afford a strong presumption that he published it. *Beare's case*, 1 *Lord Raym.* 417. A delivery of a newspaper, (containing a libel) according to the provisions of the 38 G. 3. c. 78, to the officer of the Stamp-office, is a publication, though such delivery is directed by the statute, for the officer has an opportunity of reading the libel. *Amphlitt's case*, 4 *B. & C.* 35. *See also Cook v. Ward*, 6 *Bingh.* 408.

It is said, by Mr. Justice Fortescue, to have been ruled that the finding of a libel on a bookseller's shelf, is a publication of it by the bookseller. *Dodd's case*, 2 *Sess. Ca.* 33, *Holt's L. of L.* 284, 2*d ed.* The reading of a libel in the presence of another, without knowing it to be a libel, with or without malice, does not amount to a publication. 4 *Bac. Ab.* 458, *Holt's L. of L.* 282, 2*d ed.* But if a person, who has either read a libel himself, or heard it read by another, afterwards maliciously reads or repeats any part of it to another, he is guilty of an unlawful publication of it. *Hawk. P. C. b.* 2. *c.* 73. *s.* 10.

Although, in civil cases, publication of a libel to the party libelled only is not sufficient to support an action, yet in criminal cases such publication will maintain an indictment or information. *Hawk. P. C. b.* 1. *c.* 73. *s.* 11, 1 *Russ.* 335. *Wegener's case*, 1 *Stark. N. P. C.* 245.

Where the libel is in a foreign language, and it is set out in the indictment, both in the original and in a translation, the translation must be proved to be correct. In a case of this kind an interpreter being called, read the whole of that which was charged to be a libel in the original, and then the translation was read by the clerk at *nisi prius*. *Peltier's case, Selw. N. P.* 987.

Where the libel has been printed by the directions of the defendant, and he has taken away some of the impressions, a copy of those left with the printer may be read in evidence. *Watson's case*, 2 *Stark. N. P. C.* 129, *ante, p.* 4. In order to show that the defendant had caused a libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor, the contents of which had been communicated by the defendant for the purpose

of publication; and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held, that what the report published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the reporter to the editor. *Adams v. Kelly, Ry. & Moo. N. P. C.* 157.

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy, will be no bar to an indictment for publishing another copy. *Carlile's case*, 1 *Chitty*, 451, 2 *Stark. on Slander*, 320. 2*d ed.*

Proof of publication of libels contained in newspapers.] The proof of the publication of libels contained in newspapers is facilitated by the stat. 38 G. 3. c. 78, by which an affidavit or affirmation sworn by the proprietors and printers of every newspaper, or by a certain number of them, as therein directed, is to be delivered to the commissioners of the stamp duties, such affidavit to specify the names and abode of the printer, publisher, and proprietors, if they do not exceed two, exclusive of the printer and publisher, or if they do, then of two proprietors and their proportional shares, and the description of the printing-house, and the title of the paper; and by sec. 9, all such affidavits and affirmations, or copies thereof, certified to be true copies, shall respectively, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper, or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations, as are by the said act required to be therein set forth, against every person who shall have signed, or sworn, or affirmed, such affidavits or affirmations, and shall also be received and admitted in like manner as sufficient evidence of the truth of all such matters against all and every person, who shall not have signed, or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved; provided always, that if any such person or persons respectively, against whom any such affidavit or affirmation, or any copy thereof, shall be offered in evidence, shall prove that he, she, or they, hath or have signed, sworn, or affirmed, and delivered to the said commissioners, or such officer as aforesaid, previous to the day of the date, or publication of the newspaper, or other such paper as aforesaid to which the proceedings, civil or criminal, shall relate, an affidavit or affirmation that he, she, or they hath or have ceased to be the printer or printers, proprietor or proprietors, or

publisher or publishers of such newspaper, or other such paper as aforesaid, such person or persons shall not be deemed, by reason of any former affidavit or affirmation so delivered as aforesaid, to have been the printer or printers, proprietor or proprietors, or publisher or publishers of such paper, after the day on which such last-mentioned affidavit or affirmation shall have been delivered to the said commissioners, or their officer as aforesaid. By sec. 11, it shall not be necessary after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence against the persons who signed the same, &c., or after a newspaper, or any such other paper as aforesaid, shall be produced in evidence, entitled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy, is entitled, and wherein the name or names of the printer or publisher, or printers or publishers, and the place of printing, shall be the same as those mentioned in such affidavit or affirmation, for the plaintiff to prove that the newspaper, or paper, to which such trial relates, was purchased at any house, shop, or office, belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they by themselves or their servants or workmen usually carry on the business of printing or publishing such paper, or where the same is usually sold. By sec. 14, in all cases, a copy of any such affidavit or affirmation, certified to be a true copy under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall, upon proof made, that such certificates have been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations, of which copies so produced and certified shall purport to be copies, had been produced in evidence, and had been proved to have been duly so certified, sworn, or affirmed by the person or persons appearing by such copy to have sworn or affirmed the same as aforesaid. By sec. 17, the printer or publisher of every newspaper, or other such paper as aforesaid, shall, upon every day upon which the same shall be published, or within six days after, deliver to the commissioners of stamps, at their head office, or to some officer to be appointed by them to receive the same, and whom they are hereby required to appoint for that purpose, one of the papers so published upon each such day, signed by the printer or publisher thereof, in his hand-

writing, with his name and place of abode; and in case any person or persons shall make application to the commissioners, or such officer as aforesaid, in order that such newspaper, or other paper, so signed by the printer or publisher, may be produced in evidence in any proceeding, civil or criminal, the said commissioners, or such officers, shall, at the expense of the party applying, at any time within two years from the publication thereof, either cause the same to be produced in the court in which the same is required to be produced, and at the time when the same is required to be produced, or shall deliver the same to the party applying for it, taking, according to their discretion, reasonable security at his expense for the returning the same to the said commissioners, or such officer; and in case, by reason that the same shall have been previously required by any other person to be produced in any court, or hath been previously delivered to any other person for the like purpose, the same cannot be produced at the time required, or be delivered according to such application, in such case the said commissioners, or such their officer, shall cause the same to be produced, or shall deliver the same as soon as they are enabled so to do.

Since this statute, the production of a certified copy of the affidavit and of a newspaper corresponding in the title and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, will be sufficient evidence of publication. *Mayne v. Fletcher*, 9 *B. & C.* 382. *R. v. Hunt*, 31 *State Trials*, 375. But where the affidavit and the newspaper vary in the place of residence of the party, it is insufficient. *Murray v. Souter, cited* 6 *Bingh.* 414. The statute has been held to apply to motions for criminal informations. *Donnison's case*, 4 *B. & Ad.* 698. A newspaper may be given in evidence, though it is not one of the copies published, and though it be unstamped. *Pearce's case, Peake*, 75.

Proof of publication—by admission of the defendant.] On an information for a libel, the witness, who produced it, stated that he showed it to the defendant, who admitted that he was the author of it, errors of the press and some small variances only excepted. It was objected that this evidence did not entitle the prosecutor to read the book, the admission not being absolute; but Pratt C. J. allowed it to be read, and said that he would put it to the defendant to prove material variances. *Hall's case*, 1 *Str.* 416. An admission of the signature to a libel is no admission of its having been published in a particular county. *Case of the Seven Bishops*, 12 *How. St. Tr.* 183. An admission of being the publisher of a periodical work cannot be extended beyond the date of such admission. *M'Leod v. Wakley*, 3 *C. & P.* 311.

Publication—constructive publication.] It is now well estab-

lished, that, in order to render a party guilty of publishing a libel, it is not necessary that he should be the actual publisher of it, or that he should even have a knowledge of the publication; not only is a person, who procures another to publish a libel, himself guilty of the offence, *Hawk. P. C. b.* 1. *c.* 73. *s.* 10, but a bookseller or publisher, whose servant publishes a libel, is criminally answerable for that act, though it was done without his knowledge. This rule, which is an exception to those which govern the other branches of criminal law, appears to be founded upon a principle of policy, and to have been arbitrarily adopted with the view of rendering publishers cautious with regard to the matters to which they give general circulation. The leading case on this subject is that of *Almon's case*, 5 *Burr.* 2689. The defendant, a bookseller, was convicted of publishing a libel in a magazine. The proof of the publication was, that the magazine was bought at his shop. A new trial was moved for, on the ground that the libel had been sent to the defendant's shop, and sold there by a boy without his knowledge, privity, or approbation; but the Court were clear and unanimous in opinion that this libel, being bought in the shop of a *common known bookseller and publisher*, importing, by its title-page, to be printed by him, was a sufficient *primâ facie* evidence of its being published by him,—not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. The Court regarded the matters urged as grounds for a new trial, merely as an extenuation of the offence. So Lord Kenyon ruled, that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting the paper; adding, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster; that it was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libels. *Walters's case*, 3 *Esp.* 21. And the same rule was laid down by Lord Ellenborough. *Cuthel's case*, *White's case*, *Holt, Law of Libel*, 287, 2 *Stark. on Slander*, 33, 2*d ed.* In a late case, where it was urged that the rule, respecting the liability of publishers in libel, was contrary to the principle which prevails in all other criminal cases, Lord Tenterden said, "The rule seems to me to be conformable to principle and to common sense. Surely a person, who derives profit from, and who furnishes the means of carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published,

might remain behind and escape altogether." *Gutch's case, Moody & M.* 433.

It does not appear to be well settled whether a publisher by whose servant a libel has been sold, may exonerate himself from the consequences of that act, by showing that he has himself in no way been accessory to the publication. If the libellous work has been sold by the servant in the regular performance of his duty towards his employer, the latter would, as it seems, still be answerable, although he should prove that in fact he was absent from his shop at the time, and that he was wholly ignorant of the contents of the book, and innocent of any intent to disseminate the libel. *Dodd's case*, 2 *Sess. Ca.* 33. If, on the contrary, the book was not sold by the servant in the ordinary course of his employment, but clandestinely brought by him to his master's shop, and vended there, in such case the master would not, as it seems, be guilty of the publication. In *Almon's case*, (*supra*) the Court appear to have treated the publication by the servant as presumptive evidence only of a publication as against the master, who would be entitled to rebut such presumption; and in one case it seems to have been decided that if a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him. *Woodfall's case, Essay on Libels*, 18. *See also Salmon's case, B. R. H. T.* 1777, *Hawk. P. C. b.* 1. *c.* 73. *s.* 10. (*n.*) *7th ed.* So it is said by Mr. Starkie, that the defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely, or that some deceit or surprise was practised upon him, or that he was absent under circumstances which entirely negative any presumption of privity or connivance. 2 *Starkie on Slander*, 34, 2*d ed.*

Where the libel is published by an agent of the defendant, the authority of such agent must be strictly proved. In the case of booksellers and publishers, proof that the party actually vending the libel was a servant in the way of their business, is sufficient, for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where it appeared that the libel in question was in the handwriting of the defendant's daughter, who was usually employed by him to write his letters of business; but there was no evidence that the defendant had authorised her to write this particular document, it was held to be no evidence of publication as against him. *Harding v. Greening*, 1 *B. Moore*, 477.

Proof of innuendos.] Where, in order to bring out the libellous sense of the words, innuendos are inserted in the indictment, they must, if material, be proved by witnesses acquainted with the parties, and with the transaction to be explained. It is sufficient if such witnesses speak in the first instance as to

their belief with regard to the intended application of the words; the grounds of such belief may be inquired into on cross-examination. 2 *Stark. on Slander*, 51, 2*d ed.* If the witness derives his conclusion from the terms of another libel, with the publication of which the defendant is not connected, this is not sufficient. *Bourke v. Warren*, 2 *C. & P.* 307. If a good innuendo, ascribing a particular meaning to certain words, is not supported in evidence, the party will not be permitted to ascribe another meaning to those words. *Williams v. Stott*, 1 *Crom. & M.* 675. *Archbishop of Tuam v. Robison*, 5 *Bingh.* 17, *but see Harvey v. French*, 1 *Crom. & M.* 11. If a libel contains blanks the jury ought to acquit the defendant, unless they are satisfied that those blanks are filled up in the indictment according to the sense and meaning of the writer. *Per Lord Mansfield, Almon's case*, 5 *Burr.* 2686.

Proof of malice.] Where a man publishes a writing, which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstances from which malice may be inferred. Thus, in *Harvey's case*, it was said by Lord Tenterden, that a person who publishes what is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. *Harvey's case*, 2 *B. & C.* 257. *Burdett's case*, 4 *B. & A.* 95. In such case it is incumbent upon the defendant, if he seeks to discharge himself from the consequences of the publication, to show that it was made under circumstances which justify it.

It is however frequently necessary, upon prosecutions for libel, where the expressions are ambiguous, or the intentions of the defendant doubtful, to adduce evidence for the purpose of showing the malice which prompted the act of publication. Thus, where the occasion of the publication would *primâ facie* justify the defendant, yet, if the libel be false and malicious, it is an offence; in such case, evidence of the malice must be given on the part of the prosecution to rebut the presumed justification. Where the material question, says Mr. Starkie, is whether the defendant was justified by the occasion, or acted from express malice, it seems, in principle, that any circumstances are admissible, which can elucidate the transaction, and enable the jury correctly to conclude whether the defendant acted fairly and honestly, or *malâ fide*, and vindictively for the purpose of causing evil consequences. 2 *Stark. on Slander*, 55, 2*d ed.* Upon this principle, in an action for a libel contained in a weekly paper, evidence was allowed to be given of the sale of other papers, with the same title, at the same office, for the purpose of showing that the papers were sold deliberately, and

in the regular course of circulation, and vended in regular transmission for public perusal. *Plunkett v. Cobbett*, 5 *Esp.* 136. So where on the trial of an action for a libel contained in a newspaper, *subsequent* publications by the defendant in the same paper, were tendered in evidence to show *quo animo* the defendant published the libel in question, Lord Ellenborough said, no doubt they would be admissible in the case of an indictment. *Stuart v. Lovel*, 2 *Stark. N. P. C.* 93. Again, in the trial of an action against the editor of a monthly publication for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff. *Chubb v. Westley*, 6 *C. & P.* 436. So it was held by Lord Ellenborough, that any words or any act of the defendant are admissible, in order to show *quo animo* he spoke the words which are the subject of the action. *Rustell v. Macquister*, 1 *Campb.* 49. So either the prosecutor or the defendant is entitled to have extracts read from different parts of the same paper or book which contains the libel, relating to the same subject. *Lambert's case*, 2 *Campb.* 398.

Proof of intent.] Where the malicious intent of the defendant is, by averment in the indictment, pointed to a particular individual, or to a particular act or offence, the averment must be proved as laid. Thus where the indictment alleged a publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney, it was held that proof of a publication to the prosecutor only did not maintain the indictment, and that the intent ought to have been averred, to provoke the prosecutor to a breach of the peace. *Wegener's case*, 1 *Stark. N. P. C.* 245. The allegation of intent is divisible, *ante*, *p.* 77.

Venue.] The libel must be proved to have been published in the county in which the venue is laid. Where the libel is once published, the party is guilty of a publication in every county in which such libel is afterwards published. *Johnson's case*, 7 *East*, 65. *B. N. P.* 6. So if he send it to be printed in London, it is his act if the publication is there. Upon an information for a libel, in the county of Leicester, it appeared that it was written in that county, and delivered to a person who delivered it to B. (who was not called) in Middlesex. It was inclosed in an envelope, but there was no trace of a seal. The judge directed the jury, that as B. had it open, they might presume that he received it open, and that as the defendant wrote it in the county of Leicester, it might be presumed that he received it in that county. The defendant having been found guilty, it was urged on a motion for a new trial that there was no evidence of a publication in Leicestershire; but the

Court of King's Bench (*diss.* Bayley J.) held that the direction of the judge was proper, and that if the delivery open could not be presumed, a delivery sealed, with a view to and for the purpose of publication, was a publication; and they held that there was sufficient to presume some delivery, either open or sealed, in the county of Leicester. *Burdett's case*, 4 *B. & A.* 95. In the above case the question was discussed, whether it was essential that the whole offence should be proved to have been committed in the county in which the venue was laid. Holroyd J. expressed an opinion that the composing and writing a libel in the county of L., and afterwards publishing it, though that publication was not in L., was an offence which gave jurisdiction to a jury of the county of L., (*Beere's case*, 2 *Salk.* 417, *Carth.* 409. *Knell's case*, *Barnard. K. B.* 305.) and that the composing and writing with intent afterwards to publish, was a misdemeanor; but Bayley J. held that the whole *corpus delicti* must be proved within one county, and that there was no distinction in this respect between felonies and misdemeanors. Abbott J. said, that as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L., where one of those acts had been done.

The post marks upon letters (proved to be such) are evidence that the letters which bear them were in the offices to which the post marks belong at the times denoted by the marks. *Plumer's case*, *Russ. & Ry.* 264. But the mark of double postage having been paid, is not, of itself, proof that the letter contained an inclosure. *Id.*

Proof of a newspaper under the requisitions of the statute 38 G. 3. c. 78, *ante*, *p.* 531, is proof that the paper was published in the county where the printing is described to be. *Hart's case*, 10 *East*, 94.

A letter containing a libel was proved to be in the handwriting of A, to have been addressed to a party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded to London to be forwarded to Scotland. It was produced at the trial with the proper post mark, and with the seal broken. This was held to be sufficient evidence of the letter having reached the person to whom it was addressed, and of its having been published to him. *Warren v. Warren*, 1 *C. M. & R.* 250.

Proof for the defendant.] As the offence of publishing a libel consists in the *malicious* publication of it, which, as already stated, is in general inferred from the words of the alleged libel itself, it is competent to the defendant in all cases, to show the absence of malice on his part. He cannot, it is true, give in evidence

matter of justification, that is to say, he cannot admit the publication to be malicious, and then rely for his defence upon circumstances which show that he was justified, however malicious the libel may be, but he is not precluded from giving evidence of those circumstances which tend to prove that the original publication of the libel was without malice. It may, perhaps, be laid down as a rule, that the matters which might be given in evidence under the general issue in an action, in order to disprove malice, are also admissible for the same purpose upon the trial of an indictment or information.

The defendant may, therefore, show that the publication was merely accidental, and without his knowledge, as where he delivers one paper instead of another, or delivers a letter without knowing its contents. *Topham's case*, 4 *T. R.* 127, 128. *Nutt's case*, *Fitzg.* 47. *Lord Abingdon's case*, 1 *Esp.* 226.

So the defendant, under the plea of not guilty to the indictment, may show that the libel was published under circumstances which the law recognizes as constituting either an absolute justification, or excuse, independently of the question of intention, or a qualified justification dependent on the actual intention and motive of the defendant. 2 *Stark. on Sland.* 308, 2*d ed.* Thus the defendant may show that the alleged libel was presented *bonâ fide* to the king as a petition for the redress of grievances; *Case of the Seven Bishops*, 12 *St. Tr.* 183; or to parliament; *Hawk. P. C. b.* 2. *c.* 73. *s.* 8; or that it was contained in articles of the peace exhibited to a magistrate, or in any other proceeding in a regular course of justice. *Ibid.* It seems, says Hawkins, to have been held by some, that no want of jurisdiction in the court to which such a complaint is exhibited will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel; yet if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, commenced, not with a design to go through with it, but only to expose the defendant's character under the show of a legal proceeding, it would form a ground for an indictment at the suit of the king, as the malice of the proceeding would be a good foundation for an action on the case at the suit of the party. *Ibid.*

Though it is a defence to show that the alleged libel was published by a person in a privileged capacity, as by a member of parliament in his place, or by some person in the course of a judicial proceeding, yet if it appear that the publication took place by the party, when not invested with that privileged capacity, or by a third person, who has never been invested with it, it furnishes no defence. Thus a member of parliament, who after delivering his speech in parliament, publishes it, is criminally responsible for the libel; *Creevy's case*, 1 *M. & S.* 281;

though by act of parliament, the members are protected from all charges against them for any thing said in either house. 1 *W. & M. St.* 2. *c.* 2. So where, on showing cause against a rule for a criminal information, for publishing a blasphemous and seditious libel, it was urged that it was merely the report of a judicial proceeding; yet the court held, that if the statement contained any thing blasphemous, seditious, indecent, or defamatory, the defendant had no right to publish it, though it had actually taken place in a court of justice. *Carlile's case*, 3 *B. & A.* 167.

It will, upon the same principle, be a defence to show that the supposed libel was written *boná fide*, with the view of investigating a fact in which the party is interested, provided the limits necessary for effectuating such inquiry are not exceeded. *Delany v. Jones*, 4 *Esp.* 191. *Finden v. Westlake*, *Moo. & Malk.* 461. *Brown v. Croome*, 2 *Stark. N. P. C.* 297.

So the showing a libel to the person reflected on, with the *boná fide* intention of giving him an opportunity for making an explanation, or with a friendly intention to enable him to exculpate himself, or seek his legal remedy, is no offence. 2 *Stark. on Slander*, 249, 2*d ed. B. N. P.* 8. *M'Dougall v. Claridge*, 1 *Campb.* 267. And the same with regard to a letter of friendly advice. *Id.* But an unnecessary publicity would render such a communication libellous, as if the letter were published in a newspaper. *Knight's case*, *Bac. Ab. Libel*, (*A.* 2.)

Upon the same principle the defendant may show that the supposed libel was written *boná fide* for the purpose of giving the character of a servant. *Edmondson v. Stephenson*, *B. N. P.* 8. *Weatherstone v. Hawkins*, 1 *T. R.* 110. *Pattison v. Jones*, 8 *B. & C.* 578. *Child v. Affleck*, 9 *B. & C.* 403.

How far the publication of the proceedings of a court of justice correctly given, containing a libel upon the character of an individual, and published by a third person not connected with the proceedings, and without any justification for the act, is criminally punishable, does not appear to be satisfactorily settled. *See Curry v. Walter*, 1 *Esp.* 456, 1 *B. & P.* 525, *Wright's case*, 8 *T. R.* 298. *Stiles v. Nokes*, 7 *East*, 504. *Fisher's case*, 2 *Campb.* 563. *Duncan v. Thwaites*, 3 *B. & C.* 583. *Lewis v. Clement*, 3 *B. & A.* 702. *Lewis v. Walter*, 4 *B. & A.* 613. *Flint v. Pike*, 4 *B. & C.* 476, 481. It is however decided that the publication of preliminary or *ex parte* proceedings in a court of justice, cannot be justified, as the publication of depositions before a justice of the peace on a charge of murder; *Lee's case*, 5 *Esp.* 123; or the proceedings of a coroner's inquest. *Fleet's case*, 1 *B. & A.* 379.

Statute 32 *Geo.* 3. *c.* 60.] By Mr. Fox's act (stat. 32 G. 3. c. 60.) reciting, that doubts had arisen whether on the trial of an

indictment or information for the making or publishing of a libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same, to give their verdict upon the whole matter in issue, it is (by sec. 1,) *declared* and enacted, that on every such trial the jury sworn to try the issue, may give a general verdict of not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication, by such defendant or defendants, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By sec. 2, it is provided, that on every such trial the court or judge, before whom such indictment or information shall be tried, shall according to their or his discretion, give their or his opinion or direction to the the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases. By sec. 3, it is provided, that nothing in the act contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases. And by sec. 4, in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the defendant or defendants to move an arrest of judgment on such ground and in such manner as by law he or they might have done before the passing of the act.

MAINTENANCE, &c.

Maintenance 542
Nature of the offence 542
Justification in respect of interest . . . 543
Master and servant 543
Affinity 543
Poverty 543
Counsel and attornies . . . 543
Champerty 544
Embracery 544

MAINTENANCE, CHAMPERTY, AND EMBRACERY.

Maintenance—nature of the offence.] Maintenance signifies an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. *Hawk. P. C. b.* 1. *c.* 83. *s.* 1. It may be either with regard to matters in suit, or to matters not in legal controversy. *Id. s.* 2. It is an offence punishable at common law with fine and imprisonment, and is forbidden by various statutes. 1 Ed. 3. st. 2. c. 14. 20 Ed. 3. c. 4. 1 R. 2. c. 4. 32 Hen. 8. c. 9. s. 3.

According to the old authorities, whoever assists another with money to carry on his cause, or retains one to be of counsel for him, or otherwise bears him out in the whole or any part of his suit, or by his friendship or interest saves him that expense which he might be otherwise put to, or gives evidence without being called upon to do so, or speaks in another's cause, or retains an attorney for him, or being of great power and interest says publicly that he will spend money to labour the jury, or stand by the party while his cause is tried, this is maintenance. *Hawk. P. C. b.* 1. *c.* 83. *s.* 5, 6, 7. It may be doubted, however, whether, at the present day, some of these acts would be held to amount to an indictable offence, unless they were plainly accompanied with a corrupt motive. A bare promise to maintain another is not in itself maintenance, unless it be so in respect of the public manner in which, or the power of the person by whom, it is made. *Hawk. P. C. b.* 1. *c.* 83. *s.* 8. So the mere giving of friendly advice, as what action it will be proper to bring to recover a certain debt, will not amount to maintenance. *Ibid. s.* 11.

Maintenance—justifiable—in respect of interest.] Those who have a certain interest, or even bare contingent interest, in the matter in variance, may maintain another in an action concerning such matter; as in the case of landlord and tenant, trustee and *cestui que trust*. *Hawk. P. C. b.* 1. *c.* 83. *s.* 19, 20, 21. So where A. at the request of B. defended an action brought for the recovery of a sum of money, in which B. claimed an interest, upon B. undertaking to indemnify him from the consequences of such action, this was held not to be maintenance. *Williamson v. Henley*, 6 *Bingh.* 299. So wherever persons claim a common interest in the same thing, as in a way, common, &c., by the same title, they may maintain one another in a suit relating to the same. *Hawk. P. C. b.* 1. *c.* 83. *s.* 24.

Maintenance—justifiable—master and servant.] A master may go with his servant to retain counsel, or to the trial and stand by him, but ought not to speak for him; or if arrested may assist him with money. *Hawk. P. C. b.* 1. *c.* 83. *s.* 31, 32. So a servant may go to counsel on behalf of his master, or show his evidences, but cannot lawfully lay out his own money to assist his master. *Ibid. s.* 34.

Maintenance—justifiable—affinity.] Whoever is in any way of kin or affinity to either of the parties, may stand by him at the bar, and counsel or assist him; but unless he be either father, or son, or heir-apparent, or the husband of such an heiress, he cannot justify laying out money in his cause. *Hawk. P. C. b.* 1. *c.* 83. *s.* 26.

Maintenance—justifiable—poverty.] Any one may lawfully give money to a poor man, to enable him to carry on his suit. *Hawk. P. C. b.* 1. *c.* 83. *s.* 36.

Maintenance—justifiable—counsel and attornies.] Another exception to the general rule with regard to maintenance is the case of counsel and attornies. But no counsel or attorney can justify the using of any deceitful practice in the maintenance of a client's cause, and they are liable to be severely punished for any misdemeanors of this kind. *Hawk. P. C. b.* 1. *c.* 83. *s.* 31. And by statute West. 1. c. 29, if any serjeant, pleader, or other, do any manner of deceit or collusion in the King's court, or consent to it, in deceit of the court, or to beguile the court or the party, he shall be imprisoned for a year and a day. Procuring an attorney to appear for a man, and to confess judgment without a warrant, has been held within this statute. *Hawk. P. C. b.* 1. *c.* 83. *s.* 36. So bringing a *præcipe* against a poor man, knowing he has nothing in the land, on purpose to get the possession from the true tenant. *Id. s.* 35.

Champerty.] Champerty is a species of maintenance, accompanied by a bargain to divide the matter sued for between the parties, whereupon the champertor is to carry on the suit at his own expence. 4 *Bl. Com.* 135. 1 *Russell*, 179. Champerty may be in personal as well as in real actions; *Hawk. P. C. b.* 1. *c.* 84. *s.* 5; and to maintain a defendant may be champerty. *Ibid. s.* 8.

By 31 Eliz. c. 5, the offence of champerty may be laid in any county, at the pleasure of the informer.

Various cases have occurred in modern times, in which the doctrine of champerty has come in question. Where a bill was filed to set aside an agreement made by a seaman, for the sale of his chance of prize-money, Sir William Grant, M. R. expressed an opinion that the agreement was void from the beginning, as amounting to champerty, *viz.* the unlawful maintenance of a suit, in consideration of a bargain for a part of the thing, or some profit out of it. *Stevens v. Bagwell*, 15 *Ves.* 139. So in a late case it was held, that an agreement to communicate such information as should enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. *Stanley v. Jones*, 7 *Bingh.* 369, 5 *Moore & P.* 193. *See Potts v. Sparrow*, 6 *C. & P.* 749.

Embracery.] Embracery, likewise, is another species of maintenance. Any attempt to corrupt, or influence, or instruct a jury, or to incline them to be more favourable to one side than the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of the counsel in open court, at the trial of the cause, is an act of embracery; whether the jurors give any verdict or not, and whether the verdict given be true or false. *Hawk. P. C. b.* 1. *c.* 85. *s.* 1. The giving money to a juror after the verdict, without any preceding contract, is an offence savouring of embracery; but it is otherwise of the payment of a juror's travelling expenses. *Id. s.* 3. Embracery is punishable by fine and imprisonment. *Id. s.* 7.

Analogous to the offence of embracery is that of persuading, or endeavouring to persuade, a witness from attending to give evidence, an offence punishable with fine and imprisonment. It is not material that the attempt has been unsuccessful. *Hawk. P. C. b.* 1. *c.* 21. *s.* 15. *Lawley's case*, 2 *Str.* 904. 1 *Russell*, 184.

MALICIOUS INJURIES.

General clauses 546
Apprehension of offenders . . . 546
Accessories 546
Punishment—hard labour . . . 546
With regard to mines 547
Engines, erections, &c., used in mines . . 547
With regard to breaking down sea-banks, locks, and works on rivers, canals, fish-ponds, &c . . 548
With regard to turnpike gates and houses, &c. . 549
With regard to trees and vegetable productions . 549
Proof of cutting, &c., trees above the value of 1l. in parks, &c. 549
Proof of destroying trees, &c., wheresoever growing, above the value of 1s. . . . 550
Proof of destroying plants, &c., in a garden . 551
Proof of cutting hop-binds . . . 551
With regard to ships 552
Proof of destroying a ship with intent, &c. . 552
Proof of damaging a ship, otherwise than by fire, with intent, &c. 552
Proof of exhibiting false lights, &c., with intent, &c. 553
Proof of cutting away buoys, &c. . . 553
Proof of removing anchors, &c. . . 553
With regard to machinery, and goods in the course of manufacture 554
Proof of destroying threshing machines, and machines used in manufactures 555

The law relating to malicious injuries to property, was formerly comprised in a great variety of statutes, which are now repealed by the 7 & 8 G. 4. c. 27, and new provisions substituted in their place, by the 7 & 8 G. 4. c. 30. In the latter act, certain general clauses are contained, which being applicable to the greater part of the offences after-mentioned, may be most conveniently inserted in this place.

GENERAL CLAUSES.

Proof of malice against owner.] By the 7 & 8 G. 4. c. 30. s. 25, it is enacted, that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property, in respect of which it shall be committed, or otherwise.

Apprehension of offenders.] By the 28th section of the act, for the more effectual apprehension of all offenders against this act, it is enacted, that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Accessories.] By the 26th section of the act, it is enacted, that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

Punishment—hard labour.] By the 27th section of the act it is enacted, that where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.

WITH REGARD TO MINES.

Proof of drowning a mine, or filling up a shaft with intent to destroy the mine.] The statute 39 & 40 G. 3. c. 77, relating to this subject, being repealed, the offence is now provided against by the 7 & 8 G. 4. c. 30, by the sixth section of which it is enacted, that if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment: Provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

The prosecutor must prove—1, the act of causing the water to be conveyed into the mine, for which purpose it will probably be necessary to resort to circumstantial evidence; 2, that the act was done unlawfully and maliciously; 3, the intent to destroy or damage the mine, or hinder the working; and 4, that the mine is in the possession of the party named.

The setting fire to mines is provided against by stat. 7 & 8 G. 4. c. 30. s. 5, by which it is enacted, that if any person shall unlawfully and maliciously set fire to any mine of coal, or cannel coal, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Engines, &c., used in mines.] By 7 & 8 G. 4. c. 30. s. 7, it is enacted, that if any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state,

every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned. (*Section 6, ante, p. 547.*)

WITH REGARD TO BREAKING DOWN, &c., SEA BANKS, LOCKS, WORKS ON RIVERS, CANALS, AND FISH PONDS.

The former statutes relating to these offences were the 6 G. 2. c. 37; the 8 G. 2. c. 20; the 4 G. 4. c. 46; and the 1 G. 4. c. 115; but these statutes are now repealed, and their provisions consolidated in the 7 & 8 G. 4. c. 30.

Proof of breaking down sea banks, banks of canals, marshes, &c.] By the stat. 7 & 8 G. 4. c. 30. s. 12, it is enacted, that if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.

With regard to breaking down fish-ponds, &c.] Breaking down the mounds of fish-ponds was formerly punishable by the 5 Eliz. c. 21, and the 9 G. 1. c. 22. Those statutes are repealed by the 7 & 8 G. 4. c. 30, by the 15th section of which statute, it is enacted, that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill-pond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of

the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

The above section provides against the defect in the former stat. 9 G. 1. c. 22, under which it was held, that if the prisoner broke down the mound of the pond with intent to steal the fish, it was not within the statute. *Ross's case, Russ. & Ry.* 10.

WITH REGARD TO TURNPIKE GATES, TOLL-HOUSES, &c.

By the stat. 7 & 8 G. 4. c. 30. s. 14, it is enacted, that if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing-engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly.

WITH REGARD TO TREES AND VEGETABLE PRODUCTIONS.

Proof of cutting, &c. trees, &c. above the value of 1*l. in parks, &c.*] The provisions on this subject were formerly contained in the statutes 6 G. 3, c. 36, and 4 G. 4, c. 54; but these are now repealed by the 7 & 8 G. 4, c. 27, and the following provisions substituted by the 7 & 8 G. 4, c. 30.

By the 19th section of that statute it is enacted, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house, every

such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations thereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony therein-before last mentioned.

The prosecutor must prove, 1, that the tree, sapling, &c., in question was growing in some park, pleasure ground, &c.; 2, that its value exceeded 1*l.*; 3, that it is the property of the prosecutor; 4, that the defendant cut, rooted it up, or otherwise destroyed or damaged the whole or some part of it; 5, that the act of the defendant was wilful and malicious.

When the ground is described as adjoining to a dwelling-house, and it appears that the ground and dwelling-house are separated by a walk, it is a variance. *Hodges's case, Moo. and Malk. N. P. C.* 341.

Upon the statute 9 G. 1, c. 22, s. 1, the words of which are, "shall cut down or otherwise destroy," it was held that the cutting down of fruit trees, though such cutting down did not destroy the trees, was within the act. *Taylor's case, Russ. & Ry.* 373.

Proof of destroying or damaging trees, &c. wheresoever growing, of any value above 1*s.*] By the 7 & 8 G. 4, c. 30. s. 20, it is enacted, that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before

two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the cour tmay award for the felony therein-before last mentioned.

The prosecutor must prove, 1, the two previous convictions by certified copies (see 7 & 8 G. 4, c. 30, s. 40); 2, the commission of the third offence, by proving the cutting, &c. of the tree, that it is above the value of 1s., that it is the property of the party mentioned, and that the act was done wilfully and maliciously.

Proof of destroying plants, &c. in a garden.] By the statute 7 & 8 G. 4. c. 30, s. 21, it is enacted, that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony therein-before last mentioned.

The proofs on a prosecution for this offence will resemble those in the last case.

Proof of cutting or destroying hopbinds.] By the statute 7 & 8 G. 4, c. 30. s. 18, it is enacted, that if any person shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

The prosecutor must prove the cutting or destroying of the hopbinds, that they were growing on poles in some plantation of hops, the property of the party specified, and that the act was done unlawfully and maliciously.

WITH REGARD TO SHIPS.

Proof of destroying a ship with intent, &c.] The offence of destroying ships with intent to defraud underwriters, &c., was provided against by the 43 Geo. 3. c. 113, and 33 G. 3. c. 67, now repealed by the 7 & 8 G. 4. c. 27, the following enactment being substituted by the 7 & 8 G. 4. c. 30, by the 9th section of which it is enacted, that if any person shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

The prosecutor must prove, 1, that the matter set fire to was a ship or vessel; 2, the act of setting fire to or destroying; 3, the intent within the words of the statute; and 4, the malice.

Patteson, J. inclined to think that a pleasure boat, 18 feet long, was a ship or vessel within the meaning of the act. *Bowyer's case*, 4 *C. & P.* 559.

In construing the repealed acts of 4 & 10 G. 1. it was ruled that if a ship was only run aground or stranded upon a rock, and was afterwards got off in a condition capable of being easily refitted, she could not be said to be either cast away or destroyed. *De Londo's case*, 2 *East*, *P. C.* 1098.

Where the intent is laid to be to defraud the underwriters, as to the proof of the policy, *vide ante*, *p.* 236.

Proof of maliciously damaging a ship, otherwise than by fire, with intent to destroy the same, &c.] By the 7 & 8 G. 4. c. 30. s. 10, it is enacted, that if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.

The proofs, upon a prosecution for this offence, resemble those in the case last mentioned.

In an indictment under this clause, it does not appear to be

necessary to aver that the damage was done "otherwise than by fire," if the mode in which it was done be stated, as by boring a hole in the bottom of the vessel. *Bowyer's case*, 4 *C. & P.* 559.

Proof of exhibiting false lights, &c. with intent to bring ships into danger.] By statute 7 & 8 G. 4. c. 30. s. 11, it is enacted, that if any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore; or any goods, merchandize or articles of any kind belonging to such ship or vessel; or shall by force prevent or impede any person endeavouring to save his life from such ship or vessel, (whether he shall be on board or shall have quitted the same,) every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Proof of cutting away buoys, &c.] Another offence, connected with that of malicious injuries to ships, is the wilful destruction of buoys; with regard to which, it is enacted, by the 1 & 2 G. 4. c. 75. s. 1, that if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or, to be imprisoned for any number of years, at the discretion of the Court in which the conviction shall be made.

Proof of receiving anchors, &c. weighed up.] By the 2d section of the 1 & 2 G. 4. c. 75, it is enacted, if any person shall, knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandize which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions thereinbefore contained, with regard to such articles, shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for

seven years, at the discretion of the Court before which he, she, or they shall be tried.

And by sect. 15, persons carrying anchors and cables abroad may be transported.

By 1 & 2 G. 4. c. 76, similar provisions are made for the Cinque Ports.

WITH REGARD TO MACHINERY AND GOODS IN COURSE OF MANUFACTURE.

The law relating to the destruction of machinery was contained in a variety of statutes which were repealed by the 4 Geo. 4. c. 46; and the latter statute, so far as it relates to the same subject, was also repealed by the 7 & 8 G. 4. c. 27, and the following provisions substituted by the 7 & 8 G. 4. c. 30; by the third section of which it is enacted, that if any person shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy, or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building or place, with intent to commit any of the offences aforesaid; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.

This clause enumerates a variety of separate offences. The proofs in general will be, 1, proof of the unlawful and malicious act; 2, the nature of the property upon which that act was done, which must appear to be within the description of the statute;

3, the property of the prosecutor; 4, the intent with which the act was done, according to the statute; and, 5, the malice.

Proof of destroying threshing-machines, and certain machines used in manufacture.] By statute 7 & 8 G. 4. c. 30. s. 4, if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any threshing-machine or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials, mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace,) every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.

It has been held in several cases, that it is an offence within the statute, though, at the time when the machine is broken, it has been taken to pieces, and is in different places, only requiring the carpenter to put those pieces together again. *Mackerel's case*, 4 *C. & P.* 448. So where the machine was worked by water, and the prosecutor, expecting a riot, took it to pieces, and removed the pieces to the distance of a quarter of a mile, leaving only the water-wheel and its axis standing, and the wheel was destroyed by the prisoners; this was held to be an offence within the statute. *Fidler's case*, 4 *C. & P.* 449. Where certain sideboards were wanting to a machine, at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually, it was still held to be a threshing-machine within the statute. *Bartlett's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 1517. So also where the owner removed a wooden stage, belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared that, though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn would do nearly as well, and that it could also be worked without the legs; it was held to be within the statute. *Chubb's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 151. But where the owner had not only taken the machine to pieces, but had broken the wheel, from fear of its being set on fire, and it appeared that, without the wheel, the engine could not be worked, this was held to take the case out of the statute. *West's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 1518.

Where the prisoner was indicted, under the 28 G. 3. c. 55,

s. 4, for entering a shop, and maliciously *damaging* a certain frame, used for the making of stockings, and it appeared that he had unscrewed and carried away a part of the frame called the *half-jack*, an essential part of the frame, without which it is useless, this was held a *damaging* of the frame within the statute. *Tacey's case, Russ. & Ry.* 452.

Where the prisoners were charged, under 22 G. 3. c. 40. s. 1, with breaking into a house with intent to cut and destroy certain tools employed in making woollen goods, and it appeared that the article destroyed was part of the loom itself, they were held to be rightly acquitted. *Hill's case, Russ. & Ry.* 483.

MANSLAUGHTER.

Distinction between manslaughter and murder . 556
Proof in cases of provocation . . . 557
Proof in cases of mutual combat . . . 558
Proof in cases of resistance to officers of justice, &c. . 559
Proof in cases of killing in the performance of an unlawful or wanton act 560
Proof in cases of killing in the performance of a lawful act 560

Distinction between manslaughter and murder.] Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature. 1 *East, P. C.* 218. *Foster*, 290. It also differs from murder in this respect, that there cannot be any accessories before the fact to manslaughter, since the act is presumed to be altogether sudden and without premeditation. 1 *Hale, P. C.* 437. Thus if there be an indictment charging A. with murder, and B. and C. with counselling and abetting, as accessories before the fact only, (and not as *present* aiding and abetting, for such are principals,) and A. is

acquitted of murder, but found guilty of manslaughter, B. and C. must be altogether acquitted. 1 *Hale, P. C.* 437, 450. 1 *Russell*, 485.

In considering the evidence in cases of manslaughter, it will merely be necessary to state the points shortly, and to refer generally to the cases, all of which will be found set forth at length under the title "Murder."

The subject of manslaughter will be treated under the following heads: 1, cases of provocation; 2, cases of mutual combat; 3, cases of resistance to officers of justice, &c.; 4, cases of killing in the prosecution of an unlawful or wanton act; 5, cases of killing in the execution of a lawful act, improperly performed, or performed without lawful authority. *See* 1 *Russell*, 486.

Proof in cases of provocation.] Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation, and without malice, or upon sudden combat, it will be manslaughter; if without such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder. 1 *East, P. C.* 232. *Foster*, 313.

But where the provocation is sought by the prisoner, it will not furnish any defence against the charge of murder. 1 *East, P. C.* 239. 1 *Hale, P. C.* 457.

Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the charge of murder, neither are indecent or provoking actions or gestures, without an assault. *Foster*, 290, 291. *Brain's case*, 1 *Hale, P. C.* 455. 1 *Russell*, 435. (*n.*) *Morley's case*, 1 *Hale, P. C.* 456. *Kel.* 55. 1 *East, P. C.* 233.

Although an assault is in general such a provocation as that, if the party struck strikes again, and death ensues, it is only manslaughter, yet it is not every trivial assault which will furnish such a justification. 1 *East, P. C.* 236. 1 *Russell*, 434. *Stedman's case*, *Foster*, 292. *Reason's case*, *Foster*, 293, 2 *Str.* 499. 1 *East, P. C.* 320.

In cases depending upon provocation, it is always material to consider the nature of the weapon used by the prisoner, as tending to show the existence of malice. If a deadly weapon be used, the presumption is, that it was intended to produce death, which will be evidence of malice; but if the weapon was not likely to produce death, that presumption will be wanting. 2 *Lord Raym*, 1498. *Rowley's case*, 12 *Rep.* 87. 1 *Hale, P. C.* 453. *Foster*, 294. 1 *East, P. C.* 236. 1 *Leach*, 368. *Wigg's case*, 1 *Leach*, 378. (*n.*)

In order that the provocation may have the effect of reducing the offence to manslaughter, it must appear to have been recent; for if there has been time for passion to subside, and for reason

to interpose, the homicide will be murder. *Foster*, 296. 1 *East*, P. C. 252. 2 *Lord Raym.* 1496. *Oneby's case*, 2 *Str.* 766, 2 *Lord Raym.* 1485. *Hayward's case*, 6 *C. & P.* 157.

As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of express malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 *Russell*, 440. *Mason's case*, *Foster*, 132. 1 *East*, P. C. 239.

There is one peculiar case of provocation which the law recognizes as sufficient to reduce the act of killing to manslaughter, where a man finds another in the act of adultery with his wife, and kills him in the first transport of his passion. *Manning's case*, *Sir T. Raym.* 212. 1 *Russell*, 488. But if the husband kill the adulterer deliberately, and upon revenge, after the fact and sufficient cooling time, the provocation will not avail in alleviation of the guilt. 1 *East*, P. C. 251.

Proof in cases of mutual combat.] Death in the course of a mutual combat, though in some cases it amounts to murder, is generally found to constitute manslaughter only, there being most frequently an absence of that malice requisite to a conviction for murder, and a sufficient degree of provocation to show such absence.

The degree of provocation is not altogether of the same nature in these cases as in those mentioned under the last head, for where, upon words of reproach, or indeed upon any other sudden provocation, the parties come to blows, and a combat ensues, in which no undue advantage is taken on either side, and one of the parties is killed, it is manslaughter only. 1 *East*, P. C. 241. 1 *Hale*, P. C. 456. *Foster*, 295.

But if one of the parties provide himself with a deadly weapon beforehand, which he uses in the course of the combat, and kills his adversary, this will be murder, though it would be only manslaughter if, in the heat of the combat he snatched up the weapon, or had it in his hand at the commencement of the combat, but without an intention of using it. *Anderson's case*, 1 *Russell*, 447. *Kessal's case*, 1 *C. & P.* 437. *Snow's case*, 1 *East*, P. C. 244-5.

Not only may death in the course of a mutual combat be heightened to murder by the use of deadly weapons, but by the manner of fighting, as in "an up and down fight." *Thorpe's case*, *Lewin*, C. C. 171.

To reduce the homicide to manslaughter in these cases, it must appear that no undue advantage was sought or gained on either side. *Foster*, 295. 1 *East*, P. C. 242. *Whiteley's case*, *Lewin*, C. C. 173.

The lapse of time between the origin and the quarrel is also

to be greatly considered, as it may tend to prove malice. *Lynch's case*, 3 *C. & P.* 324. But it is not in every case where there has been an old grudge that malice will be presumed. *Hawk. P. C. b.* 1, *c.* 31, *s.* 30. 1 *Hale, P. C.* 452.

The case of deliberate duelling is an exception to the general rule, that death ensuing in the course of a mutual combat is manslaughter only. *Foster*, 297. The authorities upon this subject will be found stated under the head "*Murder*," *post*.

Proof in cases of resistance to officers of justice, &c.] The cases of homicide which arise in the instances of officers of justice, or others having authority to arrest, where resistance is made to them in the execution of their duty, include every species of homicide. If the officer is killed in the lawful execution of his duty, by the party resisting him, it is *murder*. If he be killed when acting under a void or illegal authority, or out of his jurisdiction, it is manslaughter, or excusable homicide, according to the circumstances of the case. If the party about to be arrested resist, and be killed, or attempt to make his escape, and the officer cannot take him without killing him, it will be manslaughter, or excusable or justifiable homicide, according to circumstances. These distinctions will be noticed, and the different authorities, and cases collected under the head "*Murder*;" and it will only therefore be necessary to refer under the present head to the cases relating to manslaughter.

In what instances peace officers are authorised to arrest individuals, and where they have power to do so without warrant, and in what cases the process under which they act is regular or irregular, and what is the consequence of such irregularity, will be fully stated in a subsequent part of this work. *Vide post, title "Murder."*

In order to render it murder, in a person who kills an officer attempting to arrest him, it must appear that he had notice of the character in which the officer acted; for if he had not, the offence will amount to manslaughter only. *Foster*, 310. The mode in which a constable is bound to notify his authority will be stated hereafter, *post, title "Murder."*

Where a peace officer who attempts to arrest another, without having sufficient authority, is resisted, and in the course of that resistance is killed, the offence only amounts to manslaughter, as where he attempts to arrest on an insufficient charge of felony. *Curvan's case*, 1 *Moody, C. C.* 132, *post*. *Thomson's case*, *Id.* 80. So if a peace officer attempts to execute process out of his own jurisdiction, and is killed under the like circumstances. 1 *Hale, P. C.* 458. 1 *East, P. C.* 314. *Mead's case*, 2 *Stark. N. P. C.* 205, *post*. So where a peace officer unlawfully attempts to break open the outer door or window of a house, (and as to his authority herein, see *post*, title "*Murder*;")

and he is resisted, and killed in the course of that resistance, it is manslaughter. 1 *Hale, P. C.* 458.

With regard to the cases of peace officers killing others in the supposed execution of their duty, it is to be observed that where they act without proper authority, and the party refuses to submit, and death ensues, it will be murder or manslaughter, according to the circumstances of the case. 1 *Hale, P. C.* 481. *Foster,* 271.

So where an officer uses a greater degree of violence than is necessary to overcome the resistance of the party, and death ensues, it will be manslaughter in the officer. 1 *East, P. C.* 297.

So where an officer kills a party attempting to make an escape, when arrested on a charge of misdemeanor. *Forster's case, Lewin, C. C.* 187, *post.*

With regard to private persons attempting to make an arrest, the rule is the same as in the case of peace officers. Where a private person is justified in making an arrest, (as to which see the cases stated under the head "*Murder;*") and he is resisted and is killed, it will be murder. But if a private person, without lawful authority, attempt to arrest, and be killed by the party whom he attempts to arrest, it will only be manslaughter in the latter. *Vide the cases cited post, title "Murder."*

Proof in cases of killing, in the performance of an unlawful or wanton act.] If in doing an unlawful act death ensue, in consequence of the negligence of the party, but without any intent to do bodily harm, it is manslaughter. *Foster,* 261. It is not necessary, in order to render the homicide manslaughter, that the act in the performance of which death is caused should be a felony, or even a misdemeanor; it is enough if it be an act contrary to law. Thus if a person in sport throw stones down a coal-pit, whereby a man is killed, this is manslaughter, though the party was only a trespasser. *Fenton's case, Lewin, C. C.* 179.

Proof in cases of killing in the performance of a lawful act.] Death ensuing in the performance of a lawful act may amount to manslaughter, by the negligence of the party performing the act; as in the instance of workmen throwing down stones from the top of a house where they were working, where there is a small probability of persons passing by. 1 *East, P. C.* 262. *Foster,* 262.

The most common cases of this class are those where the death has been occasioned by negligent driving. 1 *East, P. C.* 263; *Walker's case,* 1 *C. & P.* 320. *Knight's case, Lewin, C. C.* 168. *Grout's case,* 6 *C. & P.* 629. Another large class of cases of manslaughter consists of those in which death takes

place in the course of prize-fights. 1 *East, P. C.* 270. *Murphy's case,* 6 *C. & P.* 103. *Hargrave's case,* 5 *C. & P.* 170.

Where a person, practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter. 1 *Hale, P. C.* 429. 4 *Bl. Com. c.* 14. *Van Butchell's case,* 3 *C. & P.* 632. *Williamson's case,* 3 *C. & P.* 635. *Long's case,* 4 *C. & P.* 398, (2*d case*;) *Senior's case,* 1 *Moody, C. C.* 346. *Simpson's case,* 4 *C. & P.* 407, (*n.*) *Lewin, C. C.* 172. *Spiller's case,* 5 *C. & P.* 333. *Ferguson's case, Lewin, C. C.* 181—all stated *post, title "Murder."*

MURDER.

Statutory provisions 563
Proof of a murder having been committed . . 564
Proof of the murder—party killed . . . 565
Proof that the prisoner was the party killing . . 567
Proof of the means of killing . . . 571
Variance in statement of 577
Proof of malice—in general . . . 579
Death ensuing in the performance of an unlawful or wanton act 580
Death ensuing in the performance of a lawful act . 582
Persons administering medicines . . 588
Intent to do bodily injury death ensuing . 591
Exposure of infants—killing by neglect, &c. . 592
Provocation in general . . . 594
By words or gestures only . . . 595
By assault 596
Where an instrument is used . . 598
Must be recent . . . 601
Express malice . . . 604
Proof of malice—cases of mutual combat . . 605
Duelling 610
Proof of malice—peace-officers and others killed in performing their duty . . . 611
Peace-officers killed or killing others in performance of their duty—their authority . . 612
Regularity of process . . . 621
Notice of their authority . . . 625
Mode of executing their duty . . . 627
Mode (where an officer has been killed) in which that killing has been effected . . 631
Private persons killed or killing others in apprehending them 634
Killing in defence of person or property . . 637
Proof in cases of felo de se. . . . 646

Murder is the voluntarily killing of any person under the king's peace, of malice prepense or aforethought, either express or implied by law. 1 *East, P. C.* 214. 3 *Inst.* 47. 1 *Hale, P. C.* 425.

Statutory provisions.] By statute 9 Geo. 4. c. 31. s. 3, every person convicted of murder, or of being accessory before the fact to murder, shall suffer death as a felon. And every accessory after the fact to murder, shall be liable at the discretion of the court to be transported beyond the seas for life, or to be imprisoned, with or without hard labour in the common gaol, or house of correction, for any time not exceeding four years.

By section 4, provision is made with regard to the period of execution, and by sec. 5, as to the dissection of the bodies of murderers.

By section 2, every offence which before the commencement of the act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence, and all persons guilty thereof, whether as principals or accessories, shall be dealt with, indicted, tried and punished, as principals and accessories in murder.

By the 2 & 3 W. 4. c. 75. s. 16, the 9 G. 4. respecting the dissecting of the bodies of murderers, was repealed, and they were directed to be hung in chains or buried as the court should direct.

By 4 & 5 W. 4. c. 26. reciting 9 Geo. 4. c. 31, 10 Geo. 4. c. 34. and the 2 & 3 W. 4. c. 75, it is enacted that so much of the said recited act made and passed in the ninth year of the reign of his Majesty King George IV., as authorises the court to direct that the body of a person convictedof murder, should, after execution, be hung in chains, and also so much of the said recited act made and passed in the 10th year of the same reign, as authorises the court to direct that the body of a person convicted of murder, should, after execution, be dissected or hung in chains, and also so much of the said recited act, made and passed in the 2d and 3d years of the reign of his present Majesty, as provides that in every case of conviction of any prisoner for murder, the court shall direct such prisoner to be hung in chains, shall be and the same is thereby repealed.

With regard to murders committed abroad, it is enacted by the 9 G. 4. c. 31. s. 7, that if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such

persons, and into such county or place as shall be appointed by the lord chancellor, or lord keeper, or lords commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to inquire of, hear, and determine all such offences, within the county or place limited in their commission, by such good and lawful men of the said county or place as shall be returned before them for that purpose, in the same manner as if the offences had been actually committed in the said county or place: Provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences, by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: Provided also, that nothing therein contained shall prevent any person from being tried in any place out of this kingdom, for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of that act.

And by section 8, of the same statute, it is enacted, that where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in England in which such death stroke, poisoning, or hurt shall happen, in the same manner in all respects, as if such offence had been actually committed in such county or place.

Proof of a murder having been committed.] The *corpus delicti*, that a murder has been committed by some one, is essentially necessary to be proved, and Lord Hale advises that in no case should a prisoner be convicted, where the dead body has not been found—where the fact of murder depends upon the fact of disappearance. *ante*, *p.* 13.

Where the death has been occasioned in secrecy, says Mr. Starkie, a very important preliminary question arises whether it has not resulted from accident, or from the act of the party himself. It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dishonor, and his property from forfeiture. Instances also have occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy by sub-

stantiating a charge of murder. (*Cowper's case*, 5 *St. Tr.*) On the other hand, in frequent instances attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. Where the circumstances are natural and real, and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcileable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. 2 *Stark. Ev.* 521, 2*d. Ed.*

The question, observes Mr. Starkie, whether a person has died a natural death, as from apoplexy, or a violent one, as from strangulation, whether the death of a person found immersed in water, has been occasioned by drowning or by force and violence previous to the immersion, (*see Cowper's case*, 5 *St. Tr.*) whether the drowning was voluntary, or the result of force, whether the wounds inflicted on the body were inflicted before or after death, are questions to be decided by medical skill.

It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial evidence against him.

Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is, therefore, in all cases expedient that all the accompanying facts should be observed and noted with the greatest accuracy; such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned. 2 *Stark. Ev.* 521, 2*d. Ed.*

Proof of the murder—as to the party killed.] A child in the womb is considered *pars viscerum matris*, and not possessing an individual existence, and cannot therefore, be the subject of murder. Thus, if a woman, quick or great with child, take a potion to procure abortion, or if another give her such potion, or strike her, whereby the child within her is killed, it is neither murder

nor manslaughter. 1 *Hale, P. C.* 433. Whether or not a child was born alive is a proper question for the opinion of medical men. Where a woman was indicted for the wilful murder of her child, and the opinion of the medical men was that it had breathed, but they could not take upon themselves to say whether it was wholly born alive, as breathing may take place before the whole delivery is completed, Littledale J. said that with respect to the birth, the being born must mean that the whole body is brought into the world, and that it is not sufficient that the child respire in the progress of its birth. *Poulton's case*, 5 *C. & P.* 329. The authority of this decision was recognized by Park, J. in *Brain's case*, where he said "a child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it has been wholly born and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after their birth. But the jury must be satisfied that the child was wholly born into the world before it was killed, or they cannot find the prisoner guilty of murder," and he cited *Poulton's case*, (supra,) *Brain's case*, 6 *C. & P.* 349. In another case Mr. Justice James Parke ruled the same way, saying, that a child might breathe before it was born, but that its having breathed was not sufficient to make the killing murder, and that there must have been an independent circulation in the child, or that it could not be considered as alive for this purpose. *Pulley's case*, 5 *C. & P.* 539.

It is said by Lord Hale, that if the child be born alive and afterwards dies in consequence of the blows given to the mother, this is not homicide. 1 *Hale, P. C.* 433. *And see* 5 *Taunt.* 21. But Lord Coke, on the contrary, says, that if the child be born alive and die of the potion, battery, or other cause, this is murder. 3 *Inst.* 50. The latter is generally regarded as the better opinion, and has been followed by modern text writers. *Hawk. P. C. b.* 1. *c.* 31. *s.* 16. 4 *Bl. Com.* 198. 1 *Russell*, 424. *See* 5 *C. & P.* 541. (*a*). And in conformity with the same opinion the following case was decided. A person grossly ignorant practising midwifery, in attempting to deliver a woman as soon as the head of the child became visible, broke and compressed the skull, and thereby occasioned its death shortly after it was born. Being indicted for manslaughter, it was objected that the child was not wholly born when the injury was received, but the Judge overruled the objection, and the prisoner being convicted, the Judges held the conviction right. *Senior's case*, 1 *Moody, C. C.* 346.

Where the indictment was for the murder of "a certain female child whose name was to the Jurors unknown," and it appeared that the child was twelve days old, and that the child's mother had said she should like to have it called

"Mary Anne," and on two occasions had called it by that name; the prisoner having been convicted, the judges held the conviction right. *Smith's case*, 6 *C. & P.* 151. Where the deceased was described as "George Lakeman Clark," and it was proved that being a bastard child, he had been baptised "George *Lakeman*," (the name of his reputed father,) and there was no evidence that he had obtained, or was called by the mother's name of *Clark*, the variance was held fatal. *Clark's case*, *Russ. & Ry.* 358. With regard to what is sufficient evidence of a child being known by a certain name it was said by Burrough, J. "It is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know him by that name, because children of so tender an age are hardly known at all, and are generally called by a Christian name only." *Sheen's case*, 2 *C. & P.* 639.

Where the indictment charged the prisoner with the murder of "a female bastard child," it was held that proof of its being illegitimate lay upon the prosecutor, but that evidence of the prisoner having told a person, that she had only told of her being with child to the father of it, who had lately got married, was sufficient evidence to support the allegation. *Poulton's case*, 5 *C. & P.* 329.

Proof that the prisoner was the party killing.] When it has been clearly established, says Mr. Starkie, that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is, of course, for the consideration of the jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally,—1st, To the probable *motive* which might have urged the prisoner to commit so heinous a crime; for, however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect that some motive, and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal. 2dly, The means and opportunity which he possessed for the perpetrating the offence. 3dly, His conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence. The case cited by Lord Coke and Lord Hale, and which has already been adverted to, is a melancholy instance to shew how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced, and injudicious person, ignorant of

the nature of evidence, and unconscious that the truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to deceit and misrepresentation. 4thly, Circumstances which are peculiar to the nature of the crime, such as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence, 2 *Stark. Ev.* 521, 2*d Ed.*

In order to convict the prisoner of murder, it is not necessary to prove that the fatal blow was given by his hand. If he was present, aiding and abetting the fact committed, he is a principal in the felony. The *presence* need not always be an actual immediate standing by, within sight or hearing of the fact. 4 *Bl. Com.* 34. Thus, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, they are all, if the fact be committed, in the eye of the law present at it. *Foster*, 350. But in order to render a party principal in the felony, he must be aiding or abetting at the fact, or ready to afford assistance if necessary. Therefore, if A. happens to be present at a murder, but takes no part in it, nor endeavours to prevent it, nor apprehends the murderer, this, though highly criminal, will not of itself render him either principal or accessory. *Foster*, 350. But in case of assassination or murder committed in private, the circumstances last stated may be made use of against A. as evidence of consent and concurrence on his part, and in that light should be left to the jury, if he be put upon his trial. *Foster*, 350.

Where the prisoner is charged with committing the act himself, and it appears to have been committed in his presence by a third person, the indictment is sustained. Thus, where the indictment charged that the prisoner "with both her hands about the neck of one M. D." suffocated and strangled, &c. and it was doubtful whether the murder was not committed in the prisoner's presence by third persons, Parke, J. in summing up, said, "If you are satisfied that this child came by her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands, for if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment." *Culkin's case*, 5 *C. & P.* 121.

In general, if a man in the prosecution of a *felonious intent* kill another, it will be murder. A. shoots at the poultry of B.

and by accident kills a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of the felonious intent; but if it be done wantonly and without that intention, it will be barely manslaughter. *Foster*, 259.

Although where a man goes out with intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it is murder; yet if several go out with a common intent to commit a felony, and death ensues by the act of one of the party, the rest will not necessarily be guilty of murder. If three persons, says Parke, J., go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of *another kind*, such as murder, the two who did not concur in this second felony, will not be guilty of it, notwithstanding it happened while they were engaged with him in the felonious act for which they went out. *Duffey's case, Lewin, C. C.* 194.

Three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by, collared the man at the gate, and asked him what business he had there; whereupon the soldier stabbed him. It was ruled by Holt, C. J. to be murder in him, but that those in the tree were innocent. They came to commit an inconsiderable trespass, and the man was killed on a sudden affray without their knowledge. It would, said Holt, have been otherwise if they had come thither with a general resolution against all opposers. This circumstance, observes Mr. Justice Foster, would have shewn that the murder was committed in prosecution of their original purpose. But that not appearing to have been the case, those in the tree were to be considered as mere trespassers. Their offence could not be connected with that of him who committed the murder. *Foster*, 353.

The following is a leading case on this subject. A great number of persons assembled at a house called Sissinghurst, in Kent, and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz. A., was known, but the rest were not known, and a warrant was obtained from a justice of the peace, to apprehend the said A. and divers persons unknown, who were altogether in Sissinghurst-house. The constable, with sixteen or twenty other persons, his assistants, went with the warrant to the house, demanded entrance, and acquainted some of the persons within that he was a constable, and came with the justice's warrant, demanding A. and the rest of the offenders who were in the house. One of the persons from within coming out, read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors, but going in, commanded the rest of the company to stand to their staves. The constable

and his assistants, fearing mischief, went away, and being about five roods from the door, several persons, about fifteen in number, issued out, and pursued the constable and his assistants. The constable commanded the peace, but they fell on his company, killing one and wounding others, and they then retired into the house to their companions, of whom A. and one G., who read the warrant, were two. For this A. and G., with those who had issued from the house, and others, were indicted for murder, and these points were resolved by the Court of K. B. 1, That although the indictment was that B. gave the stroke, and the rest were present aiding and assisting, and though in truth C. gave the stroke, or it did not appear upon the evidence which of them gave it, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment, for in law it was the stroke of all the party, according to the resolution in *Macally's case*, (9 *Co.* 67. *b.*) 2, That in this case all that were present and assisting to the rioters, were guilty of the death of the party slain, though they did not all actually strike him or any of the constable's company. 3, That those within the house, if they abetted or counselled the riot, were in law present, aiding and assisting, and principals, as well as those that issued out and actually committed the assault, for it was but within five roods of the house and in view of it, and all done as it were at the same instant. 4, That there was sufficient notice that it was the constable, before the man was killed; because he was the constable of the village; and because he notified his business at the door before the assault; and because, after his retreat, and before the man was slain, he commanded the peace. 5, It was resolved that the killing the assistant of the constable was murder as well as the constable himself. 6, That those who came to the assistance of the constable, though not specially called thereto, were under the same protection as if they had been called to his assistance by name. 7, That though the constable retired with his company upon the non-delivery up of A. yet the killing of the assistant in that retreat was murder; because the retreat was one continued act in pursuance of his office, being necessary when he could not attain the object of his warrant; but principally because the constable, in the beginning of the assault, and before the man was struck, commanded the peace. In the conclusion the jury found nine of the prisoners guilty, and acquitted those within, not because they were absent, but because there was no clear evidence that they consented to the assault, as the jury thought. *Sissinghurst-house case*, 1 *Hale, P. C.* 461.

Although the criminal intent of a single person, who, without the knowledge or assent of his companions, is guiltyof homicide, will not involve them in his guilt, yet it is otherwise where all the party proceed with an intention to commit an

unlawful act, and with a resolution at the same time to overcome all opposition by force; for if in pursuance of such resolution, one of the party be guilty of homicide, his companions will be liable to the penalty which he has incurred. *Foster*, 353. *Hawk. P. C. b.* 2. *c.* 29. *s.* 8.

Proof of the means of killing.] The killing may be by any of the thousand forms of death by which life may be overcome. 4 *Bl. Com.* 196. But there must be a corporal injury inflicted, and therefore if a man, by working upon the fancy of another, or by unkind usage, puts another into such a passion of grief or fear, as that he either dies suddenly or contracts some disease, in consequence of which he dies, this is no felony, because no external act of violence was offered of which the law can take notice. 1 *Hale, P. C.* 429. Some modes of killing are enumerated by Lord Hale: 1, By exposing a sick or weak person to the cold. 2, By laying an impotent person abroad so that he may be exposed to and receive mortal harm. 3, By imprisoning a man so strictly that he dies. 4, By starving or famine. 5, By wounding or blows. 6, By poisoning. 7, By laying noxious and noisome filth at a man's door to poison him. 1 *Hale, P. C.* 431.

Forcing a person to do an act which is likely to produce and does produce death, is murder; and threats may constitute such force. The indictment charged, first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window, and thirdly and fourthly, that he threatened to throw her out of the window, and to murder her, and that by such threats and violence she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruises received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall, but Heath, J., Gibbs, J., and Bayley, J. were of opinion, that if her death was occasioned partly by blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. *Evans's case*, 1 *Russell*, 425.

If a man has a beast which is used to do mischief, and he knowing this, purposely turns it loose, though barely to frighten people, and make what is called sport, and death ensues, it is as much murder as if he had incited a bear or a dog to worry the party; and if, knowing its propensity, he suffers it to go

abroad, and it kills a man, even this is manslaughter in the owner. 4 *Bl. Com.* 197. *Palmer*, 545. 1 *Hale, P. C.* 431.

In proving murder by poison, the evidence of medical men is frequently required, and in applying that evidence to the facts of the case, it is not unusual for difficulties to occur. Upon this subject the following observations are well deserving of attention. In general it may be taken that where the testimonies of professional men are affirmative, they may be safely credited; but where *negative*, they do not appear to amount to a disproof of a charge otherwise established by strong, various, and independent evidence. Thus on the view of a body after death, on suspicion of poison, a physician may see cause for not positively pronouncing that the party died by poison; yet if the party charged be interested in the death, if he appears to have made preparations of poisons without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly and without previous circumstances of ill health; if he has endeavoured to stifle the inquiry by prematurely burying the body, and afterwards, on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm could not be owing to any other cause, the accumulative strength of circumstantial evidence may be such as to warrant a conviction, since more cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that supposing poison to have been employed, stronger demonstrations could not reasonably have been expected, under all the circumstances, to have been produced. *Lofft in* 1 *Gilb. Ev.* 302.

With regard to the law of principal and accessory, there is a distinction between the case of murder by poison and other modes of killing. In general, in order to render a party guilty as principal, it is necessary, either that he should with his own hand have committed the offence; or that he should have been present aiding and abetting, but in the case of killing by poison it is otherwise. If A. with an intention to destroy B. lays poison in his way, and B. takes it and dies, A., though absent when the the poison is taken, is a principal. So if A. had prepared the poison and delivered it to D. to be administered to B. as a medicine, and D. in the absence of A. accordingly administered it, *not knowing that it was poison*, and B. had died of it, A. would have been guilty of murder as principal. For D. being innocent, A. must have gone unpunished, unless he could be considered as principal. But if D. had known of the poison as well as A. did, he would have been a principal in the murder, and A. would have been an accessory before the fact. *Foster*, 349. *Kel.* 52. 1 *Russell*, 23.

Whether or not the giving false evidence against another upon a capital charge, with intent to take away his life, (the party being executed upon such evidence) will amount to murder appears to be a doubtful point. There are not wanting old authorities to prove that such an offence amounts to wilful murder. *Mirror, c.* 1. *s.* 9. *Brit. c.* 52. *Bract. l.* 3. *c.* 4. See also *Hawk. P. C. b.* 1. *c.* 31. *s.* 7. But Lord Coke says "it is not holden for murder at this day." 3 *Inst.* 48. The point arose in *McDaniel's case*, where the prisoners were indicted for wilful murder, and a special verdict was found, in order that the point of law might be more fully considered. But the Attorney-general declining to argue the point of law, the prisoners were discharged. *Foster*, 131. The opinion of Sir Michael Foster, who has reported the case, is against the holding the offence to be murder, though he admits that there are strong passages in the ancient writers which countenance such a prosecution. The practice of many ages, however, he observes, by no means countenances those opinions, and he alludes to the prosecutions against Titus Oates, as shewing that at that day the offence could not have been considered as amounting to murder, otherwise Oates would undoubtedly have been so charged. *Foster*, 132. Sir W. Blackstone states, on the contrary, that though the Attorney-general declined in *McDaniel's case*, to argue the point of law, yet he has good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons, and that nothing, therefore, should be concluded from the waiving of that prosecution. 4 *Bl. Com.* 196. (*n.*) And it is asserted by Mr. East that he has heard Lord Mansfield say that the opinions of several of the Judges at the time, and his own, were strongly in support of the indictment. 1 *East, P. C.* 333, (*n.*) Sir W. Blackstone has not given any positive opinion against such an indictment, merely observing that the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the risk of their lives) has not *yet* punished the offence as murder. 4 *Bl. Com.* 197.

Doubts occasionally arise in cases of murder, whether the death has been occasioned by the wound or by the unskilful and improper treatment of that wound. The law on this point is laid down at some length by Lord Hale. If, he says, a man give another a stroke, which, it may be is not in itself so mortal, but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder, as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill applications by the party or those about him, of unwholesome salves or medicines the party dies, if it clearly appear that the medicine and not the wound was the cause of the death, it seems it is not homicide, but then it

must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect, it turn to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causâ causati.* 1 *Hale, P. C.* 428. Neglect or disorder in the person who receives the wound will not excuse the person who gave it. Thus it was resolved, that if one gives wounds to another who neglects the cure of them, and is disorderly, and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter, according to the circumstances of the case, because, if the wounds had not been given the man had not died. *Rews' case, Kel.* 26.

Whether the infliction of a blow which, had the party upon whom it was inflicted been sober, would not have produced death, will, when inflicted upon a person intoxicated and producing death, be deemed murder or manslaughter, may admit of much question. The point arose in the following case:—Upon an indictment for manslaughter, it appeared that the prisoner and the deceased had been fighting, and the deceased was killed. A surgeon stated that a blow on the stomach in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. Hullock B. directed an acquittal, observing, that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operations of the several causes, and to say with certainty that the death was immediately occasioned by any one of them in particular. His lordship cited from his notes the following case (*Brown's case, April* 1824): Indictment charging with killing by striking. The jury found that the death was occasioned by over-exertion in the fight. The judges held that the prisoner was entitled to an acquittal. *Johnson's case, Lewin, C. C.* 164. It may be doubted how far the ruling of the learned judge in this case was correct, for if by the act of the prisoner the death of the party was accelerated, it seems that the prisoner would be guilty of the felony. *See Martin's case,* 5 *C. & P.* And although a state of intoxication might render the party more liable to suffer injury from the blows, yet it is difficult to say that the intoxication was the *cause* of his death, any more than the infirmity of age or sickness, which could not, it is quite clear, be so esteemed.

Very few decisions are to be found in our own books on this subject, and it may, therefore, be allowable to illustrate it by a reference to a few cases in the Scotch law, which is in principle

the same as our own on this point, and to the text writers on the criminal law of that country. It is clear, says Mr. Alison, that if the death be owing not to the effects of the wound, but to a supervening accident or misfortune, though induced by the first violence, the prisoner cannot be convicted of homicide. Thus, if a person be wounded, no matter how severely, yet if he recover and engage in his ordinary occupations, and bear about with him no apparent seeds of his malady, the assailant cannot afterwards be involved in the consequences of his death, even though it was connected with the previous violence. So it was found in the case of Patrick Kinninmonth, Nov. 2, 1697. *Alison's Prin. Crim. Law of Scot.* 146, 1 *Hume* 181. So if a person be wounded, but recovers after a long confinement, which induces a consumption which ultimately proves fatal, still the death is here so remotely connected with the original violence that human tribunals cannot consider the one as the cause of the other. *Ib. Burnett*, 550.

If, says Mr. Alison, the death be owing not to the natural and accustomed consequences of the injury, but to remote and improbable accidents which have since intervened, the prisoner must be acquitted. *Alison's Prin. Crim. Law of Scot.* 147. The prisoner was gamekeeper to Lord Blantyre, and in the course of a scuffle with a poacher, the latter discharged his piece, which lodged its contents in his thigh. He was carried to the Glasgow infirmary, where erysipelas at the time was extremely prevalent, and having been unfortunately put into a bed formerly occupied by a patient with that disorder, he took it, and died in consequence. Till this supervened the wound bore no peculiarly dangerous symptoms. The public prosecutor strongly contended that if the man had not been fired at, he never would have been exposed to the contagion of the erysipelas, and therefore his death was by a circuitous, but legitimate consequence, owing to the wound; but this was deemed too remote a conclusion, and the prisoner, under the direction of Lords Justices Clerk, Boyle, and Succoth, was acquitted. *Campbell's case, Ibid.* In like manner where the prisoner had thrown a quantity of sulphuric acid in the face of the deceased, and produced such inflammation in the eyes, that bleeding was deemed necessary, and the orifice made by the surgeon inflamed, and of this the party died, but not of the injury in the face, the court held this *second* injury, produced by a different hand, not so connected with the original violence as to support the charge of murder, and the prisoner was convicted of assault only. *Macmillan's case. Ib.*

If the death be truly owing to the wound, it signifies not that under more favourable circumstances, and with more skilful treatment, the fatal result might have been averted. 1 *Burnett*, 551. *Alison*, 149. Thus, if an assault be made

which opens an artery, it will be no defence to plead that by the assistance of a surgeon the wound might have been staunched and life preserved. 1 *Hume*, 184. *Alison*, 149. The prisoner was one of a party of smugglers who had fired at an officer of excise. The wounded man was carried to the nearest village, where he was attended by a surgeon of the country, who was not deficient in attention, but, fever ensuing, the party died at the end of three weeks. It was objected that by skilful treatment the man might have recovered, but the court said that it was for the prisoner to prove, if he could, that death ensued *ex malo regimine*. *Edgar's case*, *Alison*, 149. The true distinction in all such cases is, that if the death was evidently occasioned by grossly erroneous medical treatment, the original author will not be answerable; but if it was occasioned from want merely of the higher skill which can only be commanded in great towns, he will, because he has wilfully exposed the deceased to a risk from which practically he had no means of escaping. Accordingly, where the prisoner was indicted for the culpable homicide of a boy in a manufactory, by striking him on the shoulder which dislocated his arm, it appearing that the arm had been worked upon two days after the blow by an ignorant bone-setter, whose operations did more harm than good, and that in consequence of the inflammation thus occasioned, acting upon a sickly and scrofulous habit of body, a white swelling ensued which proved fatal, the jury under the direction of Lord Meadowbank acquitted the prisoner. *Macewan's case*. *Ib.*

Though death do not ensue for weeks or months after the injury was received, yet if the wound be severe, and keep in a regular progression from bad to worse, so that the patient continually languishes and is consumed by it, as by a disease, this in reason and law is the same as if he had died on the spot. 1 *Hume*, 185. *Alison's Princ. Cr. Law of Scot.* 151. Thus, where the deceased, a post-boy, was robbed, cut, and left on the ground all night, and death ensued at the end of two months, and it was proved by the medical evidence that the wound, with the cold which the deceased got by lying out all night, and the great loss of blood which followed on it were the cause of his death, the prisoner was convicted of the murder as well as the robbery. *Caldwall's case*, *Burnett*, 552 (*a.*) *Alison Princ.* 151.

However feeble the condition of the deceased may have been, and however short his tenure of life, it is equally murder, as if the person killed had been in the prime of youth and vigour. Accordingly, where it appeared that the deceased, a sick and infirm old man, was violently beaten with a pair of tongs, of which in a few hours he died, and it was urged that his death was rather owing to his previous infirm condition than to the assault, it was held to be murder. *Ramsay's case*. 1 *Hume*, 183. *Alison's Princ. Cr. Law of Scot.* 149.

The same point lately arose in a case in this country. Upon a trial for manslaughter it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, but Mr. Justice James Parke in addressing the jury remarked: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it." *Martin's case*, 5 *C. & P.* 130.

Proof of the means of killing—Variance in statement.] Where a man is indicted for one species of killing, as by poison, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the means of death proved agree in substance with those charged, it is sufficient. Thus, where the death is occasioned by any weapon, the nature and description of that weapon ought to be stated; yet if it appear that the party was killed by a different weapon it maintains the indictment, as if a wound or bruise be alleged to be given with a sword, and it proves to be with a staff or axe, this difference is immaterial. 1 *East, P. C.* 341. 2 *Hale, P. C.* 185. So if the death be laid to be by one kind of poisoning and it turns out to be by another. *Ib.* Where the prisoner was charged with assaulting the prosecutor with a certain offensive weapon commonly called a "wooden staff," with a felonious design to rob him, and it was proved to be with a stone, the judges, on a conference, held this was sufficient, for the weapons produce the same sort of mischief, *viz.* by blows and bruises, and this, they said, would be sufficient even on an indictment for murder. *Sharwin's case*, 1 *East, P. C.* 341.

So where the indictment (for manslaughter) charged the wound to have been inflicted by a blow with a hammer, but there was no direct evidence that the blow had been so inflicted, and a medical man stated that the injury might have arisen either from a blow with a hammer, or by the deceased falling against the key or lock of a door, Mr Justice James Parke said in summing up "the kind of instrument is immaterial, if you think the injury was occasioned by a blow given with a hammer, or with any *other hard substance held in the hand*, the indictment will be sufficiently proved." *Martin's case*, 5 *C. & P.* 128.

Where the indictment charged that the murder had been committed by cutting "the throat" of the deceased, it was ruled that *the throat* meant what in common parlance was so called, and that the allegation was proved by showing that the jugular vein was divided, although the carotid artery was not cut, and although the surgeon stated that what he should call *the throat* was not cut. *Edwards's case*, 6 *C. & P.* 401.

Where the prisoner was charged "that with both her hands the neck and throat of the said M. D., she did feloniously &c., grasp, squeeze, and press, and by the grasping, &c., did suffocate and strangle," and it appeared that the death was caused by a hand being held over the mouth of the deceased, it was ruled that the indictment was supported, the death being proved to have been occasioned by suffocation. *Culkin's case*, 5 *C. & P.* 121.

The indictment stated that the prisoner with a certain piece of brick struck and beat the deceased, thereby giving him with the piece of brick aforesaid, one mortal wound, &c. It appeared that the prisoner struck, not with the piece of brick, but with his fist, and that the deceased fell, from the blow, upon the piece of brick, and that the fall upon the brick was the cause of his death. The judges, on a case reserved, were of opinion unanimously, that the means of death were not truly stated. *Kelly's case*, 1 *Moody, C. C.* 113. The authority of this decision was recognized soon afterwards in another case which came before the judges, under similar circumstances. *Thompson's case*, 1 *Moody, C. C.* 139.

An indictment for manslaughter, stated that the deceased was riding on horseback, and the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack upon him, which would have endangered his life, spurred his horse, whereby it became frightened and threw the deceased off, giving him a mortal fracture, &c. It appeared that the prisoner struck the deceased with a small stick, that the deceased then rode away, the prisoner riding after him, and that on the deceased spurring his horse, which was a young one, it winced and threw him. It was objected for the prisoner, 1, That the fall ought to have been laid as the cause of the death. 2, That the blow and the frightening the horse were stated jointly to have been the cause of the death, whereas the blow could not have been the cause. 3, That there was no evidence of the deceased being apprehensive of a further attack. Parke J. however, overruled all the objections, and held the evidence sufficient and the prisoner was convicted. *Hickman's case*, 5 *C. & P.* 151.

An indictment for manslaughter, charging that the prisoner "did compel A. B. and C. D. who were working at a certain windlass to leave the said windlass, and by such compulsion and force, &c., the deceased was killed," is not supported by evidence that the prisoner was working the windlass with A. B. and C. D., and that by his going away they were not strong enough to work it, and let it go. The words "compel and force" must be taken to mean *active* force. *Lloyd's case*, 1 *C. & P.* 301.

It is no variance in an indictment for murder to omit to state the intermediate process by which death was caused. The indictment charged the prisoner with thrusting divers large quantities of moss and dirt into the mouth of the deceased, a child, whereby

it was choaked, suffocated and strangled. The evidence was that the child was found with moss in its mouth, crammed in exceedingly hard. A surgeon said that in his opinion the child did not die immediately of the moss, but that, from the effects of the moss on the throat, the parts were so much injured as to prevent it swallowing or breathing. The bruising of the throat caused the death of the child by closing the passages. The prisoner being convicted, the judges, on a case reserved, held the conviction right. They said that as the primary cause of the suffocation was the forcing the moss into the mouth of the child, it was not necessary to state in the indictment the intermediate process, *viz.* the swelling of the passage of the throat which occasioned the suffocation. *Tye's case, Russ. & Ry.* 345. *See Webb's case*, 1 *Moo. & Rob.* 405.

It is not necessary, in an indictment for murder, to describe the length, breadth, or depth of the wound. *Tomlinson's case*, 6 *C. & P.* 370.

Proof of malice—in general.] The malice necessary to constitute the crime of murder, is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in the depriving the party of life. The malice prepense, says Blackstone, essential to murder, is not so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart, and it may be either express or implied in law,—express, as where one, upon a sudden provocation, beats another in a cruel and unusual manner, so that he dies, though he did not intend his death; as where a park-keeper tied a boy, who was stealing wood, to a horse's tail, and dragged him along the park; and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died. These were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 4 *Bl. Com.* 199. Also, continues the same writer, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. *Id.* 200. The Scotch law resembles our own in this particular, and the rule is well laid down by Baron Hume, "Our practice," he says, "does not distinguish between an absolute purpose to kill and a purpose to do any excessive and grievous injury to the person, so that if the pannel assault his neighbour, meaning to hamstring him or cut out his tongue, or break his

bones, or beat him severely, or within an inch of his life; and if in the prosecution of this outrageous purpose, he has actually destroyed his victim, he shall equally die for it, as if he had run him through the body with a sword. The corrupt disregard of the person and life of another, is precisely the dole or malice, the depraved and wicked purpose, which the law requires and is content with." 2 *Hume*, 254, 256.

Proof of malice—death ensuing in the performance of an unlawful or wanton act.] The rule in this case is thus laid down by Sir Michael Foster. If an action, unlawful, in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such mischievous intention do not appear, (which is matter of fact to be collected from the circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act which ensued, was unlawful. *Foster*, 261. Thus, where an injury intended to be inflicted upon A. by poison, blows, or other means of death, would, had he sustained it, have been murder; it will amount to the same offence, if B. by accident happens to lose his life by it. But on the other hand, if the blow intended for A. arose from a sudden transport of fury, which, in case A. had died by it, would have reduced the offence to manslaughter; the fact will admit of the same alleviation, if B. should happen to fall by the blow. *Foster*, 262. 1 *Hale, P. C.* 438. So where two parties meet to fight a deliberate duel, and a stranger comes to part them, and is killed by one of them, it is murder in the latter. 1 *Hale, P. C.* 441. And where the prisoner, intending to poison his wife, gave her a poisoned apple, which she, ignorant of its nature, gave to a child, who took it, and died; this was held murder in the husband, although, being present, he endeavoured to dissuade his wife from giving it to the child. *Saunders's case. Plowd.* 474. *Vide ante p.* 169. Such also was the case of the wife who mixed rats-bane in a potion sent by the apothecary to her husband, which did not kill him, but killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. 9 *Co.* 81. *Hawk. P. C. b.* 1. *c.* 31. *s.* 46.

It is not necessary, in order to render the killing murder, that the unlawful act intended, would, had it been effected, have been felony. Thus, in the case of the person who gave medicines to a woman, (1 *Hale, P. C.* 429.), and of him who put skewers into a woman's womb, with a view, in both cases, to procure abortion, whereby the women were killed; such acts were clearly held murder, though the original attempt, had it succeeded, would only have been a great misde-

meanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the persons on whom they were practised. 1 *East, P. C.* 230. So if in case of a riot or quarrel, whether sudden or premeditated, a justice of the peace, constable, or watchman, or even a private person be slain in endeavouring to keep the peace and suppress the affray, he who kills him is guilty of murder, for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy, as to go on in it, to the hazard of the lives of those who only do their duty, he is, in that respect, equally criminal as if his intention had been to commit a felony. *Hawk. P. C. b.* 1. *c.* 31. *s.* 54.

If a person rides a horse known to be used to kick, amongst a multitude of people, although he only means to divert himself, and death ensues in consequence, he will, it is said, be guilty of murder. *Hawk. P. C. b.* 1. *c.* 31. *s.* 61. 1 *Lord Raym.* 143. *Foster*, 261. 1 *East, P. C.* 231. And if a man, knowing that people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and some one is consequently killed, it is murder, on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was bent on mischief generally; but if the act were merely done incautiously, it would only be manslaughter. 1 *East, P. C.* 231. 1 *Hale, P. C.* 475. *Vide post p.* 582. In all these cases the nature of the instrument and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence. 1 *East, P. C.* 257.

The rule above stated must be taken to extend only to such acts as are *mala in se*; for if the act be merely *malum prohibitum*, as (formerly) shooting at game by a person not qualified to keep a gun for that purpose, the case of him so offending will fall under the same rule as that of a qualified person. The mere imposing of penalties will not in a case of this kind change the character of the accident. *Foster*, 259. So if one throw a stone at another's horse, and it hit a person and kill him, it is manslaughter only. 1 *East, P. C*, 257. 1 *Hale, P. C.* 39.

Death ensuing in consequence of a trespass committed in sport will be manslaughter. The prisoners were indicted for manslaughter, in having caused the death of a man by throwing stones down a coal pit. Tindal C. J., in addressing the jury said, if death ensue as the consequence of a wrongful act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or to do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present

instance the act was one of mere wantonness and sport, but still the act was wrongful, and was a trespass. *Fenton's case, Lewin, C. C.* 179.

The Scotch law does not recognize all the nice distinctions which exist in our own upon this head. The rule in that country is stated to be, that homicide, although not originally intended, will be held to be murder, when it takes place during the commission or in the attempt to commit a capital crime, or one obviously hazardous to life, but that where it ensues, without being intended, during the course of an inferior delinquency, and from which no peril to life could have been reasonably anticipated, it will amount to culpable homicide only. *Alison's Princ. Crim. Law of Scotl.* 52. Perhaps the rule with regard to implied malice has been carried, in the English practice, to at least the full length which reason and justice warrant.

Proof of malice—death ensuing in the performance of a lawful act.] Where death is occasioned by the hand of a party engaged in the performance of a lawful act, it may amount either to murder, manslaughter, or mere misadventure, according to the circumstances by which it is accompanied. The most usual illustration of this doctrine is the instance of workmen throwing stones and rubbish from a house, in the ordinary course of their business, by which a person underneath happens to be killed. If they deliberately saw the danger or betrayed any consciousness of it, whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death. For though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call for it in the instance put, the rule applies, *de non existentibus et non apparentibus eadem est ratio.* So if any person had been before seen on the spot, but due warning were given, it will be only misadventure. On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street, few persons hear the warning, or sufficiently attend to it, however loud. 1 *East, P. C.* 262. *Foster*, 262. 1 *Hale, P. C.* 472. 4 *Bl. Com.* 192.

Cases of negligent driving fall under the same consideration.

and if death ensue it will be murder, manslaughter, or misadventure, according to the caution exercised, and with reference to the place where the injury occurred. It has been already stated that under circumstances indicating a wanton and malicious disregard of human life, the offence may amount even to murder. If there be negligence only in the driver it will be manslaughter, and if negligence be absent it will amount to misadventure merely. If A. drives his cart carelessly, and it runs over a child in the street, if A. saw the child and yet drove upon him, it is murder; if he did not see the child, it is manslaughter; if the child ran across the way and it was impossible to stop the cart before it ran over the child, it is homicide, *per infortunium*. 1 *Hale, P. C.* 476. *Foster*, 263. So if a boy, riding in a street, puts his horse to full speed and runs over a child and kills him, this is manslaughter, and not *per infortunium;* and if he rides into a press of people with intent to do hurt, and the horse kills one of them it is murder in the rider. 1 *Hale, P. C.* 476. A. was driving his cart with four horses in the highway at Whitechapel. He being in his cart, and the four horses at a trot, they threw down a woman who was going the same way, with a burthen upon her head and killed her. Holt C. J., two other judges, and the recorder, held this to be misadventure only; but per Holt C. J., if it had been in a street where people usually passed, it had been manslaughter. Upon this case Mr. East has made the following observations: It must be taken for granted from this note of the case that the accident happened in a highway, *where people did not usually pass,* for otherwise the circumstance of the driver being in the cart and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person that could not get out of the way in time. And indeed such conduct in the driver of such heavy carriages, might, under such circumstances, be thought to betoken a want of due care, if any, though few persons, might probably pass by the same road. The greatest possible care is not to be expected, nor is it required, but whoever seeks to excuse himself from having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do. 1 *East, P. C.* 263. The deceased was walking along the road in a state of intoxication. The prisoner was driving a cart drawn by two horses, without reins. The horses were cantering, and the prisoner was sitting in front of the cart. On seeing the deceased, he called to him twice, to get out of the way, but from the state he was in and the rapid pace of the horses, he could not do so, and was killed. Garrow B., said, that if a man drive a cart at an unusually rapid pace,

whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving or any other cause, the person cannot get out of the way time enough, but is killed, the driver is guilty of manslaughter. He added that it is the duty of every man who drives any carriage, to drive it with such care and caution as to prevent, as far as in his own power, any accident or injury that may occur. *Walker's case*, 1 *C. & P.* 320. What will constitute negligence in the case of driving carriages, must depend greatly upon the circumstances of each particular case. It was ruled by Mr. Justice Bayley, that a carter, by being in the cart instead of at the horse's head, or by its side, was guilty of negligence: and if death ensued, of manslaughter. *Knight's case, Lewin, C. C.* 168. And the same point was ruled by Hullock B. *Anon. Ibid.*

It is sometimes very difficult to trace the boundaries between manslaughter and misadventure, as in the following case:—A man found a pistol in the street which he had reason to believe was not loaded, he having tried it with the rammer. He carried it home and showed it to his wife, and she standing before him, he pulled the cock and touched the trigger. The pistol went off and killed the woman, and this was ruled to be manslaughter. *Kel.* 41. Admitting, says Mr. Justice Foster, that this judgment was strictly legal, it was, to say no better of it, *summum jus*. But, he continues, I think it was not so; for the law in these cases does not require the *utmost* caution that *can* be used; it is sufficient that a reasonable precaution, what is *usual* and *ordinary* in the like cases, should be used. *Foster*, 264. Mr. Justice Foster mentions a similar case which occurred before himself "I once upon the circuit tried a man for the death of his wife by a like accident. Upon a Sunday morning the man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way. But before he went to dinner he discharged it and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was. He, taking it up, touched the trigger, when it went off and killed his wife, whom he tenderly loved. It came out in evidence that while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game, but before the service at church was ended restored it, *loaded*, to the place whence it was taken, and where the defendant, ignorant of what had passed, found it, to all appearance as he had left it. I did not," says Mr. Justice Foster, "inquire whether the poor man had examined the gun before he carried it home, but being of opinion, upon the whole evidence

that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him, and they did acquit him accordingly." *Foster*, 265.

Parents, masters, and other persons having authority *in foro domestico*, may administer reasonable correction to those under their care, and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of moderation, either in the measure or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances of the case. *Foster*, 262. Thus, where a master struck a child, who was his apprentice, with a great staff, of which he died, it was ruled to be murder. 1 *Hale, P. C.* 474. Speaking of homicides of this class, Mr. Justice Foster says, If they be done with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon likely to kill or maim, it will be murder: due regard being had to the age and strength of the party. *Foster*, 262. Thus, where a master directed his apprentice to do some work in his absence, and on his return, finding it had been neglected, threatened to send the apprentice to bridewell, to which he replied, "I may as well work there, as with such a master," upon which the master, striking him on the head with a bar of iron which he had in his hand, killed him, it was held murder; for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may kill them; and a bar of iron is not an instrument of correction. *Grey's case, Kel.* 64. 1 *Russell*, 461.

Though the correction exceed the bounds of moderation, yet the court will pay regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument is not such as will, in all probability, occasion death, though the party be hurried to great excess. A father, whose son had been frequently guilty of thefts, of which complaints had been made, had often corrected him. At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son by way of chastisement with a rope, by reason of which he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the prisoner, after consulting his colleague and the principal counsel on the circuit, ruled this to be manslaughter only. *Anon.* 1 *East, P. C.* 261.

Where death ensues in the case of sports or recreations, such recreations being innocent and allowable, it falls within the

rule of excusable homicide, because bodily harm is not the motive on either side. *Foster*, 259. 1 *East*, *P. C.* 268. Therefore persons playing at cudgels, *Comb.* 408, or foils or wrestling, *Lane's case*, 1 *East*, *P. C.* 268, are excusable, if death ensue. Lord Hale appears to be of a different opinion. He says, regularly, he that voluntarily and knowingly *intends hurt to the person of a man*, though he intends not death, yet if death ensue, it excuses not from the guilt of murder or manslaughter at least, as if A. intends to beat B., but not to kill him, yet if death ensue, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen: and *therefore*, he continues, I have known it ruled, that if two men are playing at cudgels together, or wrestling, by consent, if one by a blow or fall kills the other, it is manslaughter and not *per infortunium*, as Mr. Dalton, (*cap.* 90.) seems to doubt it; and accordingly it was, *P.* 2 *Car.* 2. by all the judges, upon a special verdict, from Newgate, where two friends were playing at foils at a fencing school, and one casually killed the other, resolved to be manslaughter. 1 *Hale*, *P. C.* 472.

The question in these cases appear to be twofold, 1st. whether the sport was lawful, and 2d, whether the parties engaged in it with a friendly mind, or with intent to do each other some bodily harm. The cases mentioned by Lord Hale seem to proceed upon the latter supposition, and on this ground they are distinguished by Mr. Justice Foster from the case of persons who in perfect friendship engage by mutual consent in recreations for the trial of skill or manhood, or for improvement in the use of arms. *Foster*, 259, 260. 1 *East*, *P. C.* 268.

But if there be dangerous weapons used in such sports, and there be any negligence in the use of them, and one of the parties be killed, such negligence may render the act manslaughter. Sir John Chichester, fencing with his servant, made a pass at him, which the servant parried off with a bed-staff. In the heat of the exercise the chape of the scabbard flew off, and the man was killed by the point of the sword. It was held that this was manslaughter, because, though the act which occasioned the death intended no harm, nor could it have done harm if the chape had not been struck off by the party killed, and though the parties were in sport, yet the act itself, the thrusting at the servant, was unlawful. *Aleyn*, 12. 1 *Hale*, *P. C.* 472. Mr. Justice Foster puts this decision on another ground, observing that the party did not use the degree of circumspection which common prudence would have suggested; and therefore the fact so circumstanced might well amount to manslaughter. *Foster*, 260. 1 *East*, *P. C.* 269.

Death in the course of a friendly contest may also amount to manslaughter, if any undue advantage has been taken.

Thus, if two persons are engaged to play at cudgels, and one of them makes a blow at the other likely to hurt, before he was upon his guard, and without warning, and death ensues, the want of due and friendly caution would make the act amount to manslaughter. 1 *East*, *P. C.* 269.

Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, if death casually ensue, it is only misadventure. 1 *East*, *P. C.* 269. Therefore, if a person be shooting at game or buts, or other lawful object, and a bystander be casually killed, it is only misadventure. 1 *Hale*, *P. C.* 38. 39. 472. 1 *East*, *P. C.* 269.

But if the sport or recreation be unlawful, and death ensues in the course of it, it will be murder or manslaughter, according to the circumstances of the case. Thus, where a man playing at the diversion of cock-throwing at Shrove-tide, missed his aim, and a child looking on, received a blow from the staff, of which he died, Mr. Justice Foster, (who observes that this is a barbarous, unmanly custom, productive of great disorders, and dangerous to bye-standers,) ruled it to be manslaughter. *Foster*, 261.

Prize-fights, public boxing matches, and the like, exhibited for the sake of lucre, are not lawful sports, for they serve no valuable purpose, but on the contrary encourage a spirit of idleness and debauchery. *Foster*, 260. In such case the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward be obtained; and besides, such meetings have in their nature a strong tendency to a breach of the peace. Therefore in *Ward's case*, who was challenged to fight by his adversary, for a public trial of skill in boxing, and was also urged to engage by taunts; although the occasion was sudden, yet having killed his opponent, he was held guilty of manslaughter. 1 *East*, *P. C.* 270.

So persons present at a prize fight encouraging it by their presence will, in case of death, be guilty of manslaughter. Upon an indictment for murder, charging the prisoner with being present aiding and abetting, it appeared that there had been a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence. The deceased died in consequence of the blows he received on this occasion. There was contradictory evidence as to the prisoner having acting as second. In summing up, the judge (Mr. Justice Littledale) said "my attention has been called to the evidence that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they en-

couraged it by their presence; I mean if they remained present during the fight. If they were not merely casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. But if the death ensued by violence unconnected with the fight itself, that is by blows not given by the other combatant, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter. The case is at most one of manslaughter only." *Murphy's case*, 6 *C. & P.* 103. It has been ruled, however, that persons present at a fatal prize fight are not such accomplices as that their evidence requires confirmation. *Hargrave's case*, 5 *C. & P.* 170.

Where death casually ensues in the course of a lawful employment, and there is a want of due caution on the part of the person from whom it proceeds, it will not be misadventure but manslaughter. A. having deer frequenting his corn-field out of the precinct of any forest or chase, set himself in the night time to watch in a hedge, and B. his servant to watch in another corner of the field with a gun, charging him to shoot when he heard the deer rustle in the corn. The master himself improvidently rushed into the corn, when the servant, supposing it to be the deer, shot and killed his master. This was held to be only chance-medley, for the servant was misguided by the master's own directions. But it seemed to Lord Hale, who tried the prisoner, that if the master had not given such directions, it would have been manslaughter to have shot a man, though mistaking him for a deer, because he did not use due diligence to discover his mark. 1 *Hale, P. C.* 476.

Proof of malice—death ensuing in the performance of a lawful act—persons administering medicines.] Cases of great difficulty and nicety have arisen with regard to the question of malice, where medicines have been carelessly or unskillfully administered by incompetent persons. The law on this subject is thus laid down by Lord Hale—"If a physician gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide, and the like of a surgeon. And I hold their opinion to be erroneous that think, if he be no licensed surgeon or physician that occasions this mischance, then it is felony, for physic and salves were before licensed physicians and surgeons, and therefore, if they be not licensed according to the statutes, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed, guilty of murder or manslaughter." 1 *Hale, P. C.* 429. Upon the latter point Sir William Blackstone appears to concur in opinion with Lord Hale. If a physician or surgeon, he says, gives his patient a potion or plaster to cure him, which

contrary to expectation kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it has been held that if he be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir M. Hale very justly questions the law of this determination. 4 *Bl. Com. c.* 14. The correctness of Sir M. Hale's opinion has been recognised in several late cases. Thus in *Van Butchell's case*, 3 *C. & P.* 632, Hullock B. ruled that it made no difference whether the party was a regular or an irregular surgeon, adding that in remote parts of the country many persons would be left to die, if irregular surgeons were not allowed to practise. The same opinion was expressed by Parke J. in a subsequent case, in which he observed that whether the party was licensed or unlicensed is of no consequence except in this respect, that he may be subject to pecuniary penalties, for acting contrary to charters or acts of Parliament. *Long's case*, 4 *C. & P.* 398.

But whether the party be licensed or unlicensed, if he display gross ignorance, or criminal inattention, or culpable rashness, in the treatment of his patient, he is criminally responsible. There is no doubt, says Mr. Baron Hullock, that there may be cases where both regular and irregular surgeons may be liable to an indictment, as there may be cases where from the manner of the operation even malice might be inferred. *Van Butchell's case*, 3 *C. & P.* 633, 4 *C. & P.* 407. Where a person who, though not educated as a surgeon, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman in childbirth, in consequence of which she died, was indicted for the murder, Lord Ellenborough said there has not been a particle of evidence adduced that the prisoner was guilty of murder, but it was for the jury to consider whether the evidence went so far as to make out a case of manslaughter. To substantiate that charge the prisoner must have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. One or other of these was necessary to make him guilty of that criminal negligence and misconduct which are essential to make out a case of manslaughter. *Williamson's case*, 3 *C. & P.* 635. This ruling was cited with approbation by Park J. in *Long's case*, 4 *C. & P.* 407, where he held that to support the charge of manslaughter it must appear that there was gross ignorance or inattention to human life. In *Long's case*, 4 *C. & P.* 404, a case was cited by counsel, as having occurred on the Northern circuit, where a man who was drunk went and delivered a woman, who by his mismanagement died, and he was sentenced to six months' imprisonment. And where a person grossly ignorant undertook to deliver a woman and killed the

child in the course of the delivery, it was resolved by the judges that he was rightly convicted of manslaughter. *Senior's case.* 1 *Moody, C. C.* 346.

The rule with regard to the degree of misconduct which will render a person practising medicine, criminally answerable, is thus laid down by Mr. Justice Bayley. "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying, that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." *Long's case*, 4 *C. & P.* 440. The prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool Infirmary, as cured, after undergoing salivation, and that he was recommended by another patient to go to the prisoner for an emetic, to get the mercury out of his bones. The prisoner was an old woman, residing in Liverpool, who occasionally dealt in medicines. She gave him a solution of corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland, and had gone back again. Mr. Justice Bayley, in addressing the jury, said, "I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid ought to be obtained, undertakes to administer medicines, which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequences in a case where medical assistance may be obtained. If he does so it is at his own peril. It is immaterial whether the person administering the medicine, prepares it, or gets it from another." *Simpson's case, Wilcock on Laws of Med. Prof. Appendix*, 227, 4 *C. & P.* 407, (*n*), *Lewin, C. C.* 172. The prisoner was indicted for manslaughter. It appeared that the deceased, a child, being affected with a scald head, the prisoner had directed a plaister to be applied, from the effects of which the child was supposed to have died. Bolland, B., addressing the jury, said, "The law, as I am bound to lay it down, as it has been agreed upon by the judges, (for cases of this kind have occurred of late more frequently than in former times,) is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity,"

Spiller's case, 5 *C. & P.* 333. The direction given by Tindal, C. J. in a case of this kind, where the prisoner was charged with neglecting to attend and take due care of a woman during her delivery, was as follows: "You are to say, whether in the execution of the duty which the prisoner had undertaken to perform, he is proved to have shewn such a *gross* want of care, or such a *gross* and *culpable* want of skill, as any person undertaking such a charge ought not to be guilty of, and that the death of the person named in the indictment was caused thereby." *Ferguson's case*, *Lewin*, *C. C.* 181.

In a case which lately occurred before Lord Lyndhurst, C.B. upon an indictment for manslaughter (by administering *Morison's pills*,) the law on this subject was thus laid down by his Lordship, "I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person, totally ignorant of the science of medicine, takes upon himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I had the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *Rex v. Williamson*. (*ante p.* 580.) I shall leave it to the jury to say, whether death was occasioned or accelerated by the medicines administered, and if they say it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think, that in so administering the medicines, he acted either with a criminal intention or from any gross ignorance." *Webb's case*, 1 *Moody & Rob.* 405.

A chemist, likewise, who negligently supplies a wrong drug, in consequence of which death ensues, is guilty of manslaughter. The apprentice to a chemist, by mistake, delivered a bottle of laudanum to a customer, who asked for paregoric; and a portion of the laudanum being administered to a child, caused its death. The apprentice being indicted for manslaughter, Bayley, J. directed the jury that if they thought him guilty of negligence, they should find him guilty of the manslaughter. *Tessymond's case*, *Lewin*, *C. C.* 169.

Proof of malice—intent to do bodily injury—death ensuing.] If a man assault another with intent to do him a bodily injury, and death ensue, malice, sufficient to constitute murder, will be presumed, provided the act be of such a nature, as plainly and in the ordinary course of events, must put the life of the party in danger. 4 *Bl. Com.* 200. A remarkable case, which

may be classed under this head, is mentioned by Mr. Alison. The deceased, a chimney-sweeper's boy, of eleven years of age, stuck fast in a chimney. The prisoner, having fastened ropes round the legs of the deceased, drew them with such force, that, notwithstanding his cries and the remonstrances of those present, the boy died. Being charged with this as murder, the presiding judge, Lord Justice Clerk, with the concurrence of the court, laid it down as clear law, that this was an instance of absolute recklessness and utter indifference about the life of the sufferer, and that the law knew no difference between the guilt of such a case, and that of an intention to destroy. *Rae's case, Alison's Prin. Cr. Law, Scott.* 4.

Proof of malice—exposure of infants, &c.—killing by neglect, &c.] Amongst the modes of killing mentioned by Lord Hale, are the exposing a sick or weak person or infant to the cold, with intent to destroy him, and laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it, and kills it. 1 *Hale, P. C.* 431, 432. In these cases, the offence may amount to wilful murder, under the rule that he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense. 1 *East, P. C.* 225. Such was the case of the man who carried his sick father against his will, in a severe season, from town to town, by reason whereof he died. *Hawk. P. C. b.* 1. *c.* 31. *s.* 5. 2 *East, P. C.* 225.

Cases of this kind have arisen, where apprentices or prisoners have died in consequence of the want of sufficient food and necessaries, and where the question has been whether the law would imply such malice in the master or gaoler, as is necessary to make the offence murder. The prisoner, Charles Squire, and his wife, were both indicted for the murder of a parish apprentice, bound to the former. Both the prisoners had used the deceased in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body, deposed that, in his opinion, the boy died from debility and for want of proper food and nourishment, and not from the wounds he had received. Lawrence, J., upon this evidence was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with food, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty, and executed. *Squire's case,* 1 *Russell,* 426. The not supplying an apprentice with sufficient food is an indictable misdemeanour. *Friend's case, Russ. & Ry.* 20.

Huggins, the warden of the Fleet, appointed Gibbon his

deputy, and Gibbon had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. Barnes put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, chamber-pot, or other convenience. Barnes knew the state of the room, and for fifteen days at least before the death of Arne, Huggins knew its condition, having been once present, seen Arne, and turned away. By reason of the duress of imprisonment, Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. These facts appearing on a special verdict, the court were clearly of opinion that Barnes was guilty of murder. They were deliberate acts of cruelty and enormous violations of the trust reposed by the law in its ministers of justice. But they thought Huggins not guilty. It could not be inferred from the bare seeing the deceased once during his confinement, that Huggins knew his situation was occasioned by improper treatment, or that he consented to the continuance of it. They said it was material that the species of duress by which the deceased came by his death, could not be known by a bare looking in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life, and it was likewise material that no application had been made to him, which, perhaps, might have altered the case. Besides the verdict found that Barnes was the servant of Gibbons, and Gibbons had the actual management of the prison, and the judges seemed to think that the accidental presence of the principal would not amount to a revocation of the deputy's authority. *Huggins's case*, 2 *Str.* 882. *Foster*, 322. 1 *East*, *P. C.* 331. So where a gaoler, knowing that a prisoner, infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, against his will, in the same room, and the latter prisoner, who had not had the distemper, (of which the gaoler had notice,) caught it and died of it, it was held to be murder in the gaoler. *Castell v. Bambridge*, 2 *Str.* 856. *Foster*, 322. 1 *East*, *P. C.* 331.

But where the death ensues from incautious neglect, however culpable, rather than from any actual malice or artful disposition to injure, or obstinate perseverance in doing an act necessarily attended with danger, regardless of its consequences, the severity of the law, says Mr. East, may admit of some relaxation, but the case must be strictly freed from the latter incidents. 1 *East*, *P. C.* 226. An apprentice returned from Bridewell, whither he had been sent for bad behaviour, in a lousy and distempered condition, and his master did not take the care of him which his situation required, and which he might have done. The apprentice was not suffered to lie in a bed, on account of the vermin, but was made to lie on

boards without any covering, and no medical aid was procured. The boy dying, the master was indicted for wilful murder, and the medical men who were examined were of opinion that his death was most probably occasioned by his previous ill-treatment in Bridewell, and the want of care when he went home. And they were inclined to think that had he been properly treated when he came home, he might have recovered. There was no evidence of personal violence or want of sufficient sustenance. The recorder left it to the jury to consider whether the death was occasioned by ill-treatment of the prisoner, and if so, whether the ill-treatment amounted to evidence of malice, in which case it would be murder. At the same time they were told, with the concurrence of Mr. Justice Gould and Mr. Baron Hotham, that if they thought otherwise, yet as it appeared that the prisoner's conduct towards the apprentice was highly blameable and improper, they might under all these circumstances, find him guilty of manslaughter, which they accordingly did, and the judges afterwards approved of the conviction. *Self's case*, 1 *East*, *P. C.* 226. 1 *Russell*, 426.

Proof of malice—provocation in general.] It frequently becomes a most important question in the proof of malice, whether the act was done under the sudden influence of such a degree of provocation, as to reduce the crime from murder to manslaughter. The indulgence shown to the first transport of passion in these cases, says Mr. Justice Foster, is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders the man deaf to the voice of reason. The provocation therefore, which extenuates in the case of homicide, must be something which the man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed, not what time or accident may afterwards bring to light. *Foster*, 315. Wherever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation, and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder; for in no instance can the party killing alleviate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice. 1 *East*, *P. C.* 232.

Where the provocation is sought by the prisoner, it cannot furnish any defence against the charge of murder. Thus, where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him, on which B. strikes, and A. kills him, this is murder. 1 *East*, *P. C.* 239. A. and B. having a difference, A. bade B. take a pin out of his (A.'s)

sleeve, intending thereby to take an occasion to strike or wound B.; B. did so accordingly, on which A. struck him a blow of which he died. It was held that this was wilful murder. 1, Because it was no provocation, since it was done with the consent of A.; and 2, because it appeared to be a malicious and deliberate artifice to take occasion to kill B. 1 *Hale, P. C.* 457.

Proof of malice—provocation by words or gestures only.] Words of reproach how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; neither are indecent or provoking actions or gestures, expressive of contempt or reproach, sufficient, without an assault upon the person. But a distinction is to be observed, where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill or to do some great bodily harm, in which case it will be murder, and the case where he strikes with a stick or other weapon, not likely to kill, and unluckily, and against his intention, does kill, in which latter case it will only be manslaughter. *Foster*, 290, 291. Where the deceased, coming past the shop of the prisoner, distorted his mouth and smiled at him, upon which the prisoner killed him, it was held to be murder, for it was no such provocation as would abate the presumption of malice in the party killing. *Brain's case*, 1 *Hale, P. C.* 455. If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall,) takes the wall of A., and thereupon A. kills him, this is murder; but if he had jostled A., this jostling had been a provocation, and would have made it manslaughter; so it would if A., riding on the road, B. had whipped the horse of A. out of the track, and then A. had alighted and killed B., which would have been manslaughter. 1 *Hale, P. C.* 455. 456. Upon the former case it has been observed that it probably supposes considerable violence and insult in the jostling. 1 *Russell*, 435. (*a*). If there be a chiding between husband and wife, and the husband thereupon strikes his wife with a pestle, and she dies, this is murder, and the chiding will not be a provocation to reduce it to manslaughter. 1 *Hale, P. C.* 457. In the following case the distinction taken by Mr. Justice Foster, in the passage cited as the commencement of the present paragraph came in question. A. drinking in an ale-house, B., a woman, called him "a son of a whore," upon which A. taking up a broomstick at a distance, threw it at her, which hitting her upon the head, killed her; and whether this was murder or manslaughter was the question. Two points were propounded to the judges at Serjeant's Inn; 1, Whether bare words, or words of this nature, will amount to such a provocation as will extenuate the offence into manslaughter. 2, Admitting that it

would not, in case there had been a striking with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether *this* striking, which was so improbable to cause death, will not alter the case. The judges not being unanimous in their opinions upon the point, a pardon was recommended. 1 *Hale, P. C.* 456.

In one case the judges are said to have resolved, that words of menace or bodily harm, would come within the reason of such a provocation, as would make the offence manslaughter only. *Lord Morley's case*, 1 *Hale, P. C.* 456. But in another report of the same case this resolution does not appear. *Kel.* 55. And it seems that in such case the words should be accompanied by some act denoting an intention of following them up by an actual assault. 1 *East, P. C.* 233. 1 *Russell* 435.

Proof of malice—provocation—assault.] Although, under circumstances, an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will, as a matter of course, reduce the crime to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder notwithstanding such provocation. Barbarity, says Lord Holt, (*Keate's case, Comb.* 408,) will often make malice. 1 *East, P. C.* 234. 1 *Russell*, 434.

There being an affray in the streets, the prisoner, a soldier, ran towards the combatants. The deceased, seeing him, exclaimed, "You will not murder the man will you?" The prisoner replying "what is that to you, you bitch," the deceased gave him a box on the ear, upon which the prisoner struck her on the breast with the pommel of his sword. She fled, and the prisoner pursuing her, stabbed her in the back. Holt C. J. was at first of opinion that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the blow on the ear. But it afterwards appearing that the deceased had struck the prisoner a blow in the face with an iron patten, which drew a great deal of blood, it was held only manslaughter. *Stedman's case, Foster*, 292. 1 *East, P. C.* 234. The smart of the wound, adds Mr. Justice Foster, and the effusion of the blood might possibly keep his indignation boiling till the moment of the fact. *Ibid.* A quarrel arising between some soldiers and a number of keelmen at

Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier, who had before driven part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him, he struck at them with the flat side, and as they fled pursued them. The other soldier in the meantime had got away, and when the prisoner returned he asked whether they had murdered his comrade; but being again several times assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed, the prisoner went up to him, and struck him on the head with the sword, of which he presently died. This was held manslaughter; it was not murder as the jury had found, because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner. *Brown's case*, 1 *East*, *P. C.* 245.

A gentleman named Luttrell being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent for the attorney's bill. Words arose at the lodgings about *civility money*, and Luttrell went up stairs to fetch money for the payment of debt and costs. He soon returned, with a brace of loaded pistols in his bosom, which, on the importunity of his servant, he laid down on the table, saying he did not intend to hurt the officers, but he would not be ill-used. The officer who had been sent for the bill arriving, and some angry words passing, Luttrell struck one of the officers in the face with a walking cane and drew a little blood, whereupon both of them fell upon him, one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death's wound. This was held manslaughter, by reason of the first assault with the cane. Such is the report of the case given by Sir J. Strange, upon which Mr. Justice Foster has observed that an extraordinary case it is—that all these circumstances of aggration, two to one, being helpless on the ground and begging for mercy, stabbed in nine places and then dispatched with a pistol,—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. The learned judge proceeds to state that in the printed trial (6 *St. Tr.* 195,) there are some circumstances which have been entirely dropped, and others very slightly mentioned by the reporter. I, Mr. Luttrell had a sword by his side which, after the affray was over, was found drawn and broken. How that happened did not appear in

evidence. 2, When Luttrell laid the pistols on the table, he declared that he brought them because he would not be forced out of his lodgings. 3, He threatened the officers several times. 4, One of the officers appeared to have been wounded in the hand with a pistol shot, (both the pistols being discharged in the affray,) and slightly on the wrist with some sharp pointed weapon, and the other was slightly wounded in the hand with a like weapon. 5, The evidence touching Luttrell's begging for mercy, was not that he was on the ground begging for mercy, but that on the ground he held up his hands as if begging for mercy. The chief justice directed the jury, that if they believed Luttrell endeavoured to rescue himself, (which he seemed to think was the case, and which, adds Mr. Justice Foster, probably was the case,) it would be justifiable homicide in the officers. However, as Luttrell gave the first blow, accompanied with menaces to the officers, and the circumstances of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to do if the debt had not been paid or bail given, he declared it could be no more than manslaughter. *Reason's case, Foster*, 293. 1 *Str.* 499. 1 *East, P. C.* 320.

Two soldiers, having a recruit in a room under their care, who wished to leave them, one of them stationed himself at the door with his sword drawn, to prevent ingress or egress, and a person wishing to enter the room (which was in a public-house, kept by his father,) was resisted by the soldier at the door, whereupon a struggle ensuiug, the other soldier, coming out, struck the party struggling, with his bayonet in the back. Being indicted for stabbing with intent to murder, and convicted, the judges, on a reference to them, held the conviction right, the soldiers having no authority to enlist; and they said that it would have been murder if death had ensued. *Longden's case, Russ. & Ry.* 228.

Under this head may be mentioned the cases of peace officers endeavouring to arrest without a proper authority, the killing of whom will not, unless the party can retreat, amount to murder; the attempt to make an unlawful arrest being considered a sufficient provocation. *Curvan's case*, 1 *Moody, C. C.* 132; *and see all the cases stated, post.*

Proof of malice—provocation—instrument used.] In considering the question of malice where death has ensued after provocation given by the deceased in assaulting the prisoner, or upon other provocation, especial attention is to be paid to the nature of the weapon with which death was inflicted. If it was one likely to produce that result, as used by the prisoner, he will be presumed to have used it with the intention of killing, which will be evidence of malice; if, on the contrary, it was a weapon not likely to produce death, or calculated

to give a severe wound, that presumption will be wanting. It must be admitted to be extremely difficult to define the nature of the weapons which are likely to kill; (*Ld. Raym.* 1498;) since it is rather in the mode in which the weapon is used, than in the nature of the weapon itself, that the danger to life consists. Accordingly, the decisions upon this head are far from being satisfactory, and do not lay down any general rule with regard to the nature of the weapons. In one instance, Mr. Justice Foster takes a nice distinction with regard to the size of a cudgel. The observations arise upon *Rowley's case*, 12 *Rep.* 87, 1 *Hale, P. C.* 453; which was as follows:—The prisoner's son fights with another boy, and is beaten. He runs home to his father all blood, and the father takes a staff, runs three quarters of a mile, and beats the other boy, who dies of the beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion.* "Surely," says Mr. Justice Foster, "the provocation was not very grievous. The boy had fought with one who happened to be an overmatch for him, and was worsted. If, upon this provocation, the father, after running three quarters of a mile, had set his strength against the child, and dispatched him with a hedge-stake, or any other deadly weapon, or by repeated blows with the cudgel, it would, in my opinion, have been murder; since any of these circumstances would have been a plain indication of the *malitia*, the mischievous, vindictive motive before explained. But with regard to these circumstances, with what weapon, or to what degree the child was beaten, Coke is totally silent. But Croke (*Cro. Jac.* 296,) sets the case in a much clearer light. His words are:—"Rowley struck the child with a small cudgel [*Godbold*, 182, *calls it a rod*,] of which stroke he afterwards died. I think," continues Foster, "it may be fairly collected from Croke's manner of speaking, that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*, the malignity of heart attending the fact already explained, and therefore manslaughter. I observe Lord Raymond lays great stress on the circumstance, that the stroke was with a cudgel not likely to kill." *Ld. Raym.* 1498. *Foster*, 294. The nature of the instrument used, as being most material on the question of malice, was much commented upon in the following case. It was found upon a special verdict that the prisoner had directed her daughter-in-law, a child of nine years old, to spin some yarn, and upon her return home, finding it badly done, she threw a four-legged stool at the child, and struck her on the right temple, of which the child soon afterwards died. The jury found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner, when she threw it, did not intend to kill the deceased.

She afterwards threw the body into the river, and told her husband that the child was lost. After argument in the King's Bench, (where several formal objections were taken to the special verdict,) the case, on account of its difficulty, was referred to the consideration of all the judges, but no opinion was ever delivered, as some of the judges thought it a proper case to recommend a pardon. *Pazel's case*, 1 *East*, *P. C.* 236. 1 *Leach*, 368. Where the prisoner had given a pair of clogs to the deceased, a boy, to clean, and finding them not cleaned, struck him with one of them, of which blow the boy died; this was held to be only manslaughter, because the prisoner could not, from the size of the instrument made use of, have had any intention to take away the boy's life. *Turner's case*, *Ld. Raym.* 144, 1499. The prisoner, a butcher, seeing some of his sheep getting through the hurdles of their pen, ran towards the boy who was tending them, and taking up a stake that was on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which he soon afterwards died. Nares, J. said to the jury, you will consider whether the stake, which was lying on the ground, was the first thing the prisoner saw in the heat of his passion, is or is not, under such circumstances, and in such a situation, an improper instrument for the purposes of correction. For the using a weapon from which death is likely to ensue, imports a mischievous disposition, and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if you should think the stake an improper instrument, you will further consider whether it was used with an intent to kill. If you think it was, you must find the prisoner guilty of murder. But, on the contrary, if you are persuaded that it was not done with an intent to kill, the crime will then amount at most to manslaughter. *Wigg's case*, 1 *Leach*, 378, *(n)*. A. finding a trespasser on his land, in the first transport of his passion, beats him, and kills him; this has been held manslaughter. 1 *Hale*, *P. C.* 473. But it must be understood, says Mr. Justice Foster, that he beat him not with a mischievous intention, but merely to chastise and deter him. For if he had knocked his brains out with a bill or hedge-stake, or given him an outrageous beating with an ordinary cudgel beyond the bounds of a sudden resentment, whereof he had died, it would have been murder. *Foster*, 291.

The prisoner was indicted for manslaughter. It appeared that he was in the habit of going to a cooper's shop for chips, and was told by the cooper's apprentice that he must not come again. In the course of the same day he came again, and was stopped by the apprentice, upon which he immediately went off and in passing a work-bench took up a *whittle* (a sharp pointed knife with a long handle) and threw it at the apprentice, whose body it entered and killed him. Hullock B.

said to the Jury, if without adequate provocation a person strikes another with a weapon likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice from the circumstances, and he is guilty of murder. The jury found the prisoner guilty, and Hullock B. observed that had he been indicted for murder, the evidence would have sustained the charge. *Langstaffe's case, Lewin, C. C.* 162.

Proof of malice—provocation must be recent.] In order to rebut the evidence of malice it must appear that the provocation was recent, for in every case of homicide, however great the provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. *Foster*, 296. With respect to the interval of time allowed for passion to subside, it has been observed that it is much easier to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. It must be remembered that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received, to the very instant of the mortal stroke given, for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled, any time before the mortal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, it being attributable to malice and revenge, rather than to human frailty. 1 *East, P. C.* 252. 2 *Ld. Raym.* 1496. The following are stated as general circumstances amounting to evidence of malice in disproof of the party's having acted under the influence of passion only. If, between the provocation received and the stroke given, the party giving the stroke fall in to other discourse or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, or subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of his provocation; again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it, for that shows deliberation which is inconsistent with the excuse of sudden passion, and is the strongest evidence of malice; in these cases the killing will amount to murder. It may further be observed, in respect to time, that in proportion to the lapse between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument or the manner of it. The more length of time intervening between the injury and the retaliation adds very much to the presumption of malice in law, and is in some cases evidence in itself of deliberation. 1 *East*,

P. C. 252. A leading case on this subject is that of Major Oneby, who was indicted for the murder of a Mr. Gower. A special verdict was found, which stated that the prisoner, being in company with the deceased and three other persons, at a tavern, in a friendly manner, after some time began playing at Hazard, when Rich, one of the company, asked if any one would set him three half-crowns, whereupon the deceased, in a jocular manner, laid down three half-pence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half-crowns and lost them to him; immediately after which, the prisoner in an angry manner turned to the deceased and said, it was an impertinent thing to set half-pence, and he was an impertinent puppy for so doing; to which the deceased answered, whoever called him so was a rascal. Upon this the prisoner took up a bottle, and with great force threw it at the deceased's head but did not hit him. The deceased immediately tossed a candlestick or bottle at the prisoner which missed him; upon which they both rose to fetch their swords, which hung in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company. The deceased then threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "we have had hot words, but you were the aggressor, but I think we may pass it over," and at the same time, offered his hand to the prisoner, who replied, "No, damn you, I will have your blood!" The reckoning being paid, all the company, except the prisoner, went out of the room to go home, but he called to the deceased, "Young man, come back, I have something to say to you," on which the deceased came back. The door was immediately closed and the rest of the company excluded, but they heard a clashing of swords, and the deceased was found to have received a mortal wound. It was also found that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight, and the deceased being asked on his death-bed whether he received his wound in a manner among swordsmen called fair, answered, "I think I did." It was further found, that from the throwing of the bottle there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder, he having acted upon malice and deliberation, and not from sudden passion. *Oneby's case*, 2 *Str.* 766, 2 *Ld. Raym*, 1489. It must, I think, says Mr. East, be taken, upon the facts found in the verdict, and the argument of the chief justice, that after the door had been shut the parties were upon an equal footing, in point of preparation, before the fight began in which the mortal wound was given. The main point then upon which the judgment turned, and so declared to be,

was *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances the court were of opinion that the prisoner had had *reasonable time for cooling*, after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, *he would have his blood!* And again the prisoner remaining in the room after the rest of the company had retired, and calling back the deceased by the contemptuous appellation of *young man*, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness, as precluded the presumption of passion being continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances, for it must have been implied, according to *Mawgridge's case*, (*Kel.* 128,) that he acted upon malice, having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of the deceased, made a deadly assault upon him. 1 *East, P. C.* 254.

The following case will illustrate the doctrine in question. The deceased was requested by his mother to turn the prisoner out of her house, which, after a short struggle, he effected, and in doing so, gave him a kick. On the prisoner leaving the house, he said to the deceased, "he would make him remember it," and instantly went up the street to his own lodging, which was distant from two to three hundred yards, where he was heard to go to his bed-room, and, through an adjoining kitchen, to a pantry, and thence to return hastily back again by the same way, to the street. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate. He had also three similar knives there, which he used in his trade of a butcher. About five minutes after the prisoner had left the deceased, the latter followed him for the purpose of giving him his hat, which he had left behind him, and they met about ten yards distant from the prisoner's lodgings. They stopped for a short time, and were heard talking together, but without any words of anger, by two persons who went by them, the deceased desiring the prisoner not to come down to his mother's again that night, and the prisoner insisting that he would. After they had walked on together for about fifteen yards, in the direction of the mother's house, the deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with a knife, or some sharp instrument, in two places, giving him a sharp wound on the shoulder, and a mortal wound in the belly. As soon as the prisoner had stabbed the deceased a second time, he said he had served him right, and instantly ran back to his lodging, and was heard, as before, to pass hastily through his bed-room and kitchen to the pantry, and thence back to the

bed-room, where he went to bed. No knife was found upon him, and the several knives appeared the next morning in their usual places in the pantry. Tindal, C. J. told the jury that the principal question for their consideration would be, whether the mortal wound was given by the prisoner, while smarting under a provocation so recent and so strong, that he might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only: or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner, was the shortness of time which elapsed between the original quarrel and the stabbing of the deceased; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound, was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say, whether the prisoner had shewn thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion. The jury found the prisoner guilty of murder. *Hayward's case*, 6 *C. & P.* 157.

Proof of malice—provocation—express malice.] As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there is proof of *express malice* at the time of the act committed, the provocation will not reduce the offence from murder to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 *Russell*, 440. This rule is illustrated by the following case: Richard Mason was indicted and convicted for the wilful murder of William Mason, his brother; but execution was respited to take the opinion of the judges, upon a doubt whether, upon the circumstances given in evidence, the offence amounted to murder or manslaughter. The prisoner, with the deceased and some neighbours, were drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to push each other about the room. They then wrestled one fall; and soon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either side, till the prisoner, in the cudgel play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry, and throwing away his cudgel, closed in with the prisoner, and they fought a short time in good earnest; but the

company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me, if I do not fetch something, and stick him;" and, being reproved for such expressions, he answered, "I'll be damned to all eternity, if I do not fetch something, and run him through the body." The deceased and the remainder of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having in the meantime changed a slight for a thicker coat. The door of the room being open to the street, the prisoner stood leaning against the door-post, his left-hand in his bosom, and a cudgel in his right; looking in upon the company, but not speaking a word. The deceased, seeing him in that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me, and beat me." The deceased assured him he would not, and added, "Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel, as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, stand off or I'll stab you," and immediately, without giving the deceased time to stand off, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little, and the prisoner, shortening the sword in his hand, leaped forward towards the deceased, and stabbed him to the heart; and he instantly died. The Judges, at a conference, unanimously agreed, "that there are in this case so many circumstances of deliberate malice and deep revenge on the prisoner's part, that his offence cannot be less than wilful murder." *Mason's case, Fost.* 132. 1 *East, P. C.* 239.

Proof of malice—cases of mutual combat.] The rules, with regard to the proof of malice in cases of mutual combat, are not in all respects the same with those which have been already stated; with regard to cases of provocation in general, and as the former are of very frequent occurrence it may be convenient to consider them under one head.

In this class of cases the degree or species of provocation does not enter so deeply into the merits of the question, as in those which have been just noticed, and in the former it has been held that where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a

combat ensues, no undue advantage being taken or sought on either side, if death ensue, this amounts to manslaughter only. Nor is it material what the cause be, whether real or imagined, or who draws or strikes first, provided the occasion be sudden, and not urged as a cloak for pre-existing malice. 1 *East*, P. C. 241.

Many, says Lord Hale, who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation, as to lessen the crime into manslaughter, were yet of this opinion, that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and B. kills A., this is manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and though B. gave the first stroke, and after a blow received from A., B. gives him a mortal stroke, this is but manslaughter; according to the proverb, the *second blow makes the affray*; and this, adds Lord Hale, was the opinion of myself and others. 1 *Hale*, P. C. 456. *Foster*, 295. But if B. had drawn his sword and made a pass at A., *his sword then undrawn*, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed, this would have been murder; for B. by making his pass, *his adversary's sword undrawn*, showed that he sought his blood, and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. But if B. had first drawn and forborne till his adversary had drawn too, it had been no more than manslaughter. *Foster*, 295. 1 *East*, P. C. 242.

With regard to the use of deadly weapons in a case of mutual combat, the rule was laid down by Mr. Justice Bayley, in the following case. The prisoner and Levy quarrelled, and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner, who had a clasped knife before the affray. Bayley, J. told the jury, that if the prisoner used the knife privately from the beginning, or if, before they began to fight, he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder. *Anderson's case*, 1 *Russell*, 447.

Another late case exhibited nearly similar circumstances. The prisoner returning home was overtaken by the prosecutor. They were both intoxicated, and a quarrel ensuing, the prosecutor struck the prisoner a blow. They fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued and overtook him. On this, the prisoner, who had taken out his knife, gave the prosecutor a cut across

the abdomen. The prisoner being indicted for cutting the prosecutor with intent to murder him, Park, J. left it to the jury whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so gain an advantage in the conflict; for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, he was of opinion that if death had ensued, the crime of the prisoner would have been murder; or whether the prisoner *bonâ fide* ran away from the prosecutor with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; and in the latter case, if the prosecutor had been killed, it would have been manslaughter only. *Kessal's case*, 1 *C. & P.* 437.

In the following case, the use of a deadly weapon during a fight was held not to be evidence of malice, the prisoner happening to have the knife in his hand at the commencement of the affray. William Snow was indicted for the murder of Thomas Palmer. The prisoner, who was a shoemaker, lived in the neighbourhood of the deceased. One evening the prisoner, who was much in liquor, passed accidentally by the house of the deceased's mother, near which the deceased was at work. He had a quarrel with him there, and after high words they were going to fight, but were prevented by the mother, who hit the prisoner in the face and threw water over him. The prisoner went into his house, but came out in a few minutes, and set himself down upon a bench before his gate, with a shoemaker's knife in his hand, paring a shoe. The deceased, on finishing his work, returned home by the prisoner's house, and called out to him as he passed, "Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" on which the deceased took the prisoner by the collar, and dragging him off the bench, they both rolled into the cart-way. While they were struggling and fighting, the prisoner underneath the deceased, the latter cried out, "You rogue, what do you do with that knife in your hand?" and caught at his arm to secure it; but the prisoner kept his hand striking about, and held the deceased so hard with his other hand that he could not get away. The deceased, however, at length made an effort to disengage himself, and during the struggle received the mortal wound in his left breast, having before received two slight wounds. The jury found the prisoner guilty of murder; but judgment was respited, to take the opinion of the judges, who (in the absence of De Grey, C. J.) were unanimously of opinion that it was only manslaughter. They thought that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour

to revenge his former quarrel by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, provoked him neither by word nor gesture. The deceased began first by ill language, and afterwards by collaring him and dragging him from his seat, and rolling him in the road. The knife was used openly, before the deceased came by, and not concealed from the by-standers; though the deceased in his passion did not perceive it till they were both down; and, though the prisoner was not justifiable in using such a weapon on such an occasion, yet, it being already in his hand, and the attack upon him very violent and sudden, they thought it only amounted to manslaughter, and he was recommended for a pardon. *Snow's case*, 1 *East*, *P. C.* 244, 245.

Not only will the premeditated use of deadly weapons, in cases of mutual combat, render the homicide murder, but the combat itself may be of such a nature as to make it murder, if death ensue. The prisoner was indicted for manslaughter, and the evidence was, that he and the deceased were "fighting up and down," a brutal and savage practice in the north of England. Bayley J. said to the jury, Fighting 'up and down' is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of this description, it is murder, and not manslaughter. The prisoner being convicted, Bayley J. told him, that had he been charged with murder, the evidence adduced would have sustained the indictment. *Thorpe's case*, *Lewin*, *C. C.* 171.

In order to bring the case within the rule relating to mutual combats, so as to lessen the crime to manslaughter, it must appear that no undue advantage was sought or taken on either side. *Foster*, 295. To save the party, making the first assault upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put upon an equal footing, in point of defence at least, at the outset; and this is peculiarly requisite, where the attack is made with deadly or dangerous weapons. 1 *East*, *P. C.* 242. Where persons fight on fair terms, says Mr. Justice Bayley, "and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder. *Whiteley's case*, *Lewin*, *C. C.* 173.

The lapse of time, also, which has taken place between the

origin of the quarrel and the actual contest, is in these cases a subject of great consideration, as in the following instance. The prisoner was indicted for the wilful murder of William Harrington. It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public-house, on the night of the 27th of February, till about twelve o'clock; that about one, they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away. He however returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The prisoner's father proved that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellects, but not so much so as not to know right from wrong. Lord Tenterden, in summing up, said, It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went any where for the knife. The father says that it was a knife he carried about with him, it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears, he might have gone a little way from the deceased, and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind, (which, under the circumstances, I should think you hardly would,) then you will find

him guilty of murder. The jury found the prisoner guilty of manslaughter. *Lynch's case*, 5 *C. & P.* 324.

In cases of mutual combat, evidence is frequently given of old quarrels between the parties, for the purpose of showing that the person killing acted from malice towards the deceased, but it is not in every case of an old grudge, that the jury will be justified in finding malice. Thus, where two persons who have formerly fought in malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge; *Hawk. P. C. b.* 1. *c.* 31. *s.* 30; unless it appear that the reconciliation was pretended only. 1 *Hale, P. C.* 452. If, says Lord Hale, A. sues B., or threatens to sue him, this alone is not sufficient evidence of malice prepense, though possibly they meet and fall out and fight, and one kills the other, if it happens upon sudden provocation; but this may by circumstances be heightened into malice prepense, as if A., without any other provocation, strikes B. upon account of that difference in law, or lies in wait to kill him, or comes with a resolution to strike or kill him. 1 *Hale, P. C.* 451.

Proof of malice—cases of mutual combat—duelling.] Deliberate duelling, if death ensues, is in the eye of the law murder; for duels are generally founded in deep revenge. And though a person should be drawn into a duel, not on a motive so criminal, but merely upon the punctilio of what the swordsmen falsely call honour, that will not excuse him. For he that deliberately seeks the blood of another, in a private quarrel, acts in defiance of all laws, human and divine, whatever his motive may be. But if upon a sudden quarrel the parties fight on the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them falls, it will be only manslaughter, because it may be presumed that the blood never cooled. It will however be otherwise, if they appoint to fight the next day, or even upon the same day, at such an interval, as that the passion might have subsided, or if from any circumstance attending the case, it may be reasonably concluded that their judgment had actually controlled the first transport of passion before they engaged. The same rule will hold, if after a quarrel they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling. *Foster*, 297. It seems agreed, says Hawkins, that wherever two persons in cool blood meet, and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, and that he had often declined to meet him, but was prevailed upon by his importunity, or that it was his intention only to vindicate his reputation, or that he meant not to kill but only to disarm his adversary, for since he deliberately engaged in an act highly

unlawful, he must at his peril abide the consequences. *Hawk. P. C. b.* 1. *c.* 31. *s.* 21.

It is said by Lord Hale, that if A. and B. meet deliberately to fight, and A. strikes B., and pursues him so closely, that B. in safeguard of his own life kills A., this is murder in B., because their meeting was a compact, and an act of deliberation, and therefore all that follows thereupon is presumed to be done in pursuance thereof, and thus is *Dalton* (*cap.* 92. *p.* 241,) to be understood. 1 *Hale, P. C.* 452. But yet, *quære*, adds Lord Hale, whether if B. had really and *bonâ fide* declined to fight, ran away as far as he could, (suppose it half a mile,) and offered to yield, yet A., refusing to decline it, had attempted his death, and B. after all this kills A. in self-defence, whether it excuses him from murder? But if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it is murder. *Ibid.* Blackstone has noticed this doubt, but has given no opinion upon the subject; 4 *Com.* 185; but Mr. East has argued at some length in support of the proposition, that such homicide will not amount to murder, on the ground that B., by retreating, expressly renounces the illegal combat, and gives reasonable grounds for inducing a belief that he no longer seeks to hurt his opponent, and that the right of self-defence ought not therefore to be withheld from him. 1 *East, P. C.* 285. But if B. does not retreat *voluntarily*, but is driven to retreat by A., in such case the killing would be murder. Thus it is said by Hawkins, that if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there, in his own defence, he is guilty of murder in respect of his first intent. *Hawk. P. C. b.* 1. *c.* 31. *s.* 26.

In cases of deliberate duelling, in which death ensues, not only is the principal who inflicts the wound guilty of murder, but also the second, and it has been doubted whether the second of the party killed is not also guilty of the same offence. For the latter position, Lord Hale cites the book of 22 *Edw.* 3. *Coron.* 262, but he adds, that he thinks the law was too much strained in that case, and that though a great misdemeanor, it is not murder. 1 *Hale, P. C.* 442.

Proof of malice—peace officers and others killed in performing their duty—what persons are within the rule.] The protection is not confined to the person of the officer only. Every one lending his assistance to an officer of the peace, for the keeping of the peace, whether commanded to do so or not, is under the same protection as the officer. *Foster*, 309. 1 *Hale, P. C.* 463.

Nor is the protection confined to the ordinary ministers of justice or their assistants. It extends, with some limitations, to private persons interposing to prevent mischief in case of an affray, or endeavouring to apprehend felons, or persons who

have given a dangerous wound, and bring them to justice. For those persons are discharging a duty required of them by law. *Foster*, 309. But in the case of private persons endeavouring to bring felons to justice, this caution must be observed—*viz.* that a felony has been actually committed, for if not, no suspicion, however well founded, will bring the person so interposing within the protection of the law; and supposing a felony to have been actually committed, and the party interposing to arrest a wrong person, he will not be entitled to protection. *Foster*, 318.

There is a distinction between this case and that of a peace officer, who has a warrant against a particular person by name, though that person may happen to be innocent of the offence with whichehe is charged. If A., being a peace officer, has a warrant from a proper magistrate for apprehending B. *by name*, upon a charge of felony, or if B. stands indicted for felony, or if the hue and cry be levied against B. *by name*, in these cases, if B., though innocent, flies, or turns and resists, and in the struggle or pursuit is killed by A., or any person joining in the hue and cry, the person so killing will be indemnified. And on the other hand, if A. or any other person joining in the hue and cry is killed by B., or any of his accomplices joining in that outrage, it will be murder. For A. and those joining with him were in this instance in the discharge of a duty the law requires from them, and subject to punishment, in case of a wilful neglect of it. *Foster*, 318.

Proof of malice—peace officers killed, or killing others in performance of their duty—their authority.] It will be convenient to consider the evidence relating to the conduct of peace officers in the execution of their duty, under the following heads:—1, their authority or warrant; 2, what notice of their authority is required; 3, the mode of executing their authority; and 4, the mode, where an officer is killed, in which that killing was effected.

With regard to the *authority* of a peace officer, and those assisting him, they are justified in apprehending, without any warrant, all persons who have committed a felony, or have been indicted for felony, and if in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. 1 *East, P. C.* 298, 300. So a peace officer may justify an arrest on a charge of felony, on reasonable suspicion, although it should afterwards appear that no felony has been committed. *Samuel v. Payne, Dougl.* 359. 1 *East, P. C.* 301. The constable, it is observed by Lord Hale, cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till he be apprehended, which he thinks a sufficient reason for justifying him in killing the party accused, if he fly from the arrest, and cannot otherwise be taken,

however innocent he may afterwards appear to have been. 2 *Hale, P. C.* 84, 89, 93. 1 *East, P. C.* 301. All that can in reason be required of the peace officer is, that he should inform himself, as well as he can, of the circumstances, and that the relation of the party who gave him information, should appear credible. 1 *East, P. C.* 302. But in order to justify a peace officer in making an arrest, upon suspicion of felony, on the charge of another, it must appear that the party arrested was charged with *felony*. The prisoner having quarrelled with his master about wages, the latter threatened to send for a constable. The prisoner went up stairs for his tools, and said no constable should stop him, and coming down, he drew from his sleeve a naked knife, saying he would do for the first bloody constable that offered to stop him;—that he was ready to die, and would have a life before he lost his own, and making a flourishing motion with his knife, he put it in his sleeve again, and left the shop. The master then applied to a constable, but made no charge, only saying he suspected the prisoner had tools of his, and was leaving his work undone. The constable told him he would take him, if the master would give him in charge, upon which the master took the constable to the place in which the prisoner was, (a privy) and said "That is the man, I give you in charge of him." The constable then said to the prisoner, "My good fellow, your master gives you in charge to me, you must go with me." The prisoner, without speaking, stabbed the constable with a knife under the left breast, and attempted to make three other blows. Being indicted for maliciously stabbing the constable, and convicted, a case was reserved for the opinion of the judges, the majority of whom held, that as the actual arrest would have been illegal, an attempt to make it, when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only, and that there the conviction was wrong. Holroyd J., and Burrough J., thought otherwise. *Thomson's case*, 1 *Moody, C. C.* 80. So in the following case, (which was an indictment under the 43 G. 3, for cutting the prosecutor, who had assisted the constable), the charge upon which the constable and the prosecutor acted, was held to be not sufficient to justify the arrest. A person travelling on the highway told the constable that a man coming on the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take him before a magistrate for so misusing him, on which the constable meeting the prisoner passing along the highway, ordered him to stop, for insulting a man on the road, and told him he was his prisoner, ordering the prosecutor to assist him. The prisoner being in custody, attempted to escape, but being pursued by the prosecutor, gave him the cut in the face, for which he was indicted

and convicted. On a case reserved, the judges were of opinion that the original arrest was illegal, and that the recaption would also have been illegal: that the case would not have been murder if death had ensued, and that the prisoner was consequently entitled to an acquittal. *Curvan's case*, 1 *Moody, C. C.* 132. But in order to justify the officer, the charge need not contain the same accurate description of the offence, as would be required in an indictment. Thus, where the prisoner was delivered into the custody of a constable, who was told that it was because he had a forged note in his possession, and the prisoner shot at, and wounded the constable, and was thereupon indicted for that offence, it was held, on a reference to the judges, that the conviction was right. They were of opinion, that though the charge on which the prisoner was taken into custody, *viz.* the having a forged note in his possession, without more, was defective, still that defect was immaterial; that it was not necessary that the charge should contain the same accurate description of the offence as an indictment, and that it must be considered as imputing to the prisoner a *guilty* possession. *Ford's case, Russ. & Ry.* 329.

At common law, both peace officers and private persons are justified, without a warrant, in apprehending and detaining, until they can be carried before a magistrate, all persons found attempting to commit a felony. *Hunt's case*, 1 *Moody, C. C.* 93.

So at common law, either a constable or a private person may interpose, without warrant, to prevent a breach of the peace, and if he be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed, is guilty of murder, and cannot excuse himself by alleging that what he did was in a sudden affray, in the heat of blood, for he who carries his resentment so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him, than by doing their duty, and endeavouring to restrain him by breaking through his, shows such an obstinate contempt of the law, that he is no more to be favoured, than if he had acted in cool blood. *Hawk. P. C. b.* 1. *c.* 31. *s.* 48.

But whether a constable or other peace officer is warranted in arresting a person upon a charge by another, of a mere breach of the peace, after the affray is ended, without a special warrant from a magistrate, is a point which has occasioned some doubt. According to some authorities, the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice, to find security for his appearance. 2 *Hale, P. C.* 90. *Handcock v. Sandham, Williams v. Dempsey*, 1 *East, P. C.* 306. (*n.*) But the better opinion is said to be the other way. 1 *East, P. C.* 305. *Hawk. b.* 2. *c.* 12. *s.* 20. 2 *Russell*, 506. *See Timothy v. Simpson*, 1 *C. M. & R.*

757. It seems, however, that if one person threatens to kill another, who complains to a constable, the latter may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him before a justice of the peace. 2 *Hale, P. C.* 88. This power is grounded on the duty of the officer, to prevent a probable felony, and must be governed by the same rules which apply to that case. 1 *East, P. C.* 306.

According to Lord Hale, a peace-officer may arrest *night-walkers* or persons unduly armed, who will not yield themselves, and if they fly or resist, and the officer, in endeavouring to arrest them, kills them, it is not felony, though the parties be innocent. 2 *Hale, P. C.* 85, 97. But unless there were a reasonable suspicion of felony in such a case, it may be a matter of doubt at this day, says Mr. East, whether so great a degree of severity would be either justifiable or necessary, especially in case of mere flight. 1 *East, P. C.* 303. In one case it was held that the apprehension of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person arrested was innocent, and there were no reasonable grounds to mislead the officer. *Tooley's case*, 2 *Lord Raym.* 1301. And Lord Holt is reported to have said, that constables had made a practice of taking up people only for walking the streets, but he knew not whence they had such an authority. 2 *Hale, P. C.* 89. (*note.*) In a late case of an action for false imprisonment, it appeared that the plaintiff was returning home late from a party, when a constable seized him as a disorderly person, and carried him before the captain of the watch (the defendant), who, upon the information of the constable, sent him to the House of Correction till the following morning. The defendant justified under a local act, which gave power to apprehend all *night-walkers*, malefactors, and suspicious persons. But Bayley, J., said this was no defence to the action; that by *night-walkers* was meant such persons as are in the habit of being out at night for some wicked purpose, and that there was no evidence to show that the plaintiff was a malefactor or suspicious person. *Watson v. Carr, Lewin, C. C.* 6.

It is said in one case that watchmen and beadles have power at common law to arrest and detain in prison for examination, persons walking in the streets at night, *where there is reasonable ground to suspect of felony*, although there is no proof of a felony having been committed. *Lawrence v. Hedger*, 3 *Taunt.* 14. This case, however, does not appear to extend beyond the rule already laid down, that every peace officer has authority, upon a reasonable suspicion of felony, to arrest a party, whether by day or by night. It is said by Hawkins, that it is held by some that any *private person* may lawfully arrest a suspicious night-walker, and detain him till it be made to appear that he is a person of good reputation; and also that it has been adjudged that any one may apprehend a *common notorious cheat*

going about the country with false dice, and being actually caught playing with them, in order to have him brought before a justice of the peace. *Hawk. P. C. b.* 2, *c.* 13, *s.* 20, *and see the* 5 *G.* 4. *c.* 83, *s.* 6, *stated post.*

An officer is not justified in killing, to prevent an escape, where the party is in custody on a charge of misdemeanor. The prisoner, an excise officer, had apprehended a smuggler, who, after his capture, assaulted the officer, and beat him severely, when the former fired a pistol at his legs, and warned him to keep off. The smuggler, however, rushed forwards, when the prisoner again fired at and killed him. Holroyd, J. said to the jury, an officer must not kill for an *escape* when the party is in custody for a misdemeanor, but if the prisoner had reasonable grounds for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of using such weapon by the previous violence he had suffered, then he was justified. *Forster's case, Lewin, C. C.* 187.

By various statutes, peace officers and others are authorised to arrest certain offenders without warrants. The most important of these acts are those of 7 & 8 Geo. 4. c. 29, and c. 30. By the former (s. 63) it is enacted, That any person found committing any offence punishable either by indictment or upon summary conviction, by virtue of that act, except only the offence of angling in the day time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace. The 7 & 8 G. 4. c. 30, s. 28, contains a provision in the same words, applicable to offences committed against that act.

By the metropolitan police act, 10 G. 4. c. 44, s. 7, it is enacted, That it shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find, between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under that act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail in the manner therein-after mentioned.

Under this statute it has been ruled that a police constable is not justified in laying hold of, pushing along the highway, and

ordering to be off, a person found by him conversing in a crowd with another, merely because that other is known as a reputed thief. *Stocken v. Carter*, 4 *C. & P.* 477.

Whether persons in his Majesty's navy, acting in the impressment of seamen, are to be held to enjoy, in the execution of their duty, the same privileges as a peace officer acting by virtue of a warrant, does not seem to be well settled. It is clear, however, that in order to justify the act there must be a warrant, and that it must be executed by a proper officer. It is, however, laid down by Mr. East, that if there be a proper officer with a legal warrant to impress, and the party endeavoured to be taken, being a fit object for that service, refuse to submit, and resist and kill the officer or any of his assistants, they doing no more than is necessary to impress the mariner, it will be murder. 1 *East, P. C.* 308. On the other hand, if the party attempted to be pressed be killed in such struggle, it seems justifiable, provided the resistance could not be otherwise overcome; and the officer need not give way, but may freely repel force by force. *Ibid.*

The following is one of the few cases to be found on this subject, and it can scarcely be said to recognize any principle with regard to the practice of impressment.

An officer in the impress service put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects for the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her with a musket loaded with ball, *for the purpose of hitting the hallyards, and bringing the boat to*, which was found to be the usual way, one of which shots unfortunately killed Collyer. The court said it was impossible for it to be more than manslaughter. This, it may be presumed, was on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt was intended, it was manslaughter; and the defendant was burned in the hand. *Phillip's case, Cowper*, 832. 1 *East, P. C.* 308.

The following cases only establish the position, that the impressment of persons without warrant, is an illegal proceeding, and that the parties concerned do not enjoy the protection afforded to ministers of the law in the execution of their duty. The lieutenant of a press gang, to whom the execution of a warrant was properly deputed, remained in King Road in the port of Bristol, while his boat's crew went some leagues down the channel by his directions to press seamen. It was held that this impressment was illegal, and one of the press gang being killed, in the furtherance of that service, by a mariner, in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only man-

slaughter, though no personal violence had been offered by the press gang. *Broadfoot's case, Foster*, 154. So where the mate of a ship and a party of sailors, without the captain (who had the warrant) or the lieutenant, who was deputed to execute it, impressed a man, and on his resisting, the prisoner, one of the party, struck him a violent blow with a large stick, of which he died some days afterwards, it was adjudged murder. *Dixon's case*, 1 *East, P. C.* 313. In this case the party attempted to be impressed was not a mariner, and the attempt to impress him was therefore illegal upon that ground, as upon the ground that neither the captain nor the lieutenant was present. 1 *East, P. C.* 313. A press warrant had been directed to Lieutenant Wm. Palmer, enjoining all mayors, &c. to assist him and *those employed by him* in the execution thereof. Palmer gave verbal orders to the prisoners and several others to impress certain seafaring men, but the delegation was held to be clearly bad, and the execution of the warrant by the prisoners, Palmer not being there, to be illegal, although it was proved to be the constant custom of the navy to delegate the authority in this manner. *Borthwick's case*, 1 *Dougl.* 207. 1 *East, P. C.* 313.

A sailor in the king's navy, on duty as a sentinel, has no authority to fire upon persons approaching the ship against orders. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officers on deck allowed them to approach, and he received a musket, three blank cartridges, and three balls. Some boats pressing forwards, he called upon them repeatedly to stop; but one of them persisted and came close under the ship. He then fired at a man who was in the boat, and killed him. It was put to the jury whether he did not fire under the mistaken impression that it was his duty, and they found that he did. But on a case reserved, the judges resolved unanimously, that it was nevertheless, murder. They thought it, however, a proper case for a pardon, and further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. *Thomas's case*, 1 *Russell*, 509.

A question sometimes arises, where peace officers are in the performance of their duty, of conflicting authority, namely, whether they are to be subjected to the interference of other peace officers, on a charge or supposition of their having themselves been guilty of an offence in the execution of their duty. A case of this kind is put by Lord Hale. A. and B. being constables of the vill of C., and a riot happening between several persons, A. joined one party, and commanded the adverse party to keep the peace, and B. joined the other party, and in like manner commanded the adverse party to keep the peace. The assistants and party

of A. in the tumult killed B. This, adds Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and one had as much authority as the other. 1 *Hale, P. C.* 460. It is remarked upon this passage, by Mr. East, that perhaps it would have been better expressed to have said, that inasmuch as they acted not with a view so much to keep the peace as in the nature of partisans to the different parties, they acted altogether out of the scope of their character as peace officers, and without any authority whatever. For if one having a competent authority, issue a lawful command, it is not in the power of any other having an equal authority to issue a command contrary to the first, for that would be to legalise confusion and disorder. 1 *East, P. C.* 304. And this doctrine seems to be supported by another passage from Lord Hale, who says, that if the sheriff have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constable of the vill to assist him and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter, but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ. 1 *Hale, P. C.* 460. The sheriff's officers having apprehended a man by virtue of a writ, a mob attempted to rescue him. One of the bailiffs being assaulted, struck one of the assailants, a woman, and for some time it was thought he had killed her; whereupon the constable was sent for and charged with the custody of the bailiff. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence offered to them, notwithstanding which, he proceeded to take them into custody on the charge of murder. The woman having recovered, they were discharged next morning. The constable being indicted for the assault, Heath J. was of opinion that he and his assistants were guilty of an assault, and a verdict was found accordingly. *Anon.* 1 *East, P. C.* 305.

A peace officer is to be considered as acting strictly in discharge of his duty, not only while executing the process entrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty. He is under the protection of the law, *eundo, morando, et redeundo.* And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will amount to murder. *Foster,* 308. 1 *Hale, P. C.* 463. Upon the same principle, if he meets with opposition by the way, and is killed before he comes to the place, (such opposition being intended to prevent his performing his duty, a fact to be collected from the evidence,) it will also amount to murder. *Foster,* 309.

The authority of a constable or other peace officer, ceases with the limits of his district, and if he attempts to execute process out of the jurisdiction of the court or magistrate by whose orders he acts, and is killed, it is only manslaughter, as in the case of void process. 1 *Hale, P. C.* 458. 1 *East, P. C.* 314. So where a bailiff attempted to execute a writ without a *non omittas* clause, within an exclusive liberty, Holroyd, J. held him a trespasser, and the defendant who had wounded him in resisting, and who was indicted for maliciously killing him, was acquitted. *Mead's case*, 2 *Stark. N. P. C.* 203.

But if the warrant be directed to a particular constable by name, and it is executed by him within the jurisdiction of the court or magistrate issuing the same, although it be out of the constable's vill, that is sufficient. 1 *East, P. C.* 314. *Hawk. P. C. b.* 2. *c.* 13. *s.* 27. By statute 5 G. 4. c. 18, reciting, that warrants addressed to constables, &c., of parishes, &c., in their character of, and as constables, &c., of such respective parishes, &c., cannot be lawfully executed by them out of the precincts thereof respectively, it is enacted, that it shall be lawful to and for each and every constable, and to and for each and every headborough, tithing-man, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, hamlet, township, or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner, as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borsholder, or other peace officer, specially, by his name, or names, and notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place, for which he shall be constable, headborough, tithing-man, or borsholder, or other peace-officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate, or magistrates, by whom any such warrant or warrants shall be backed or indorsed.

In general where it becomes necessary, in order to show the character of the offence, to prove that the deceased, or the prosecutor, or other person was a constable, it will be sufficient to prove that he acted in that character, which will be *primâ facie* evidence of his regular appointment, without its production. *Vide ante*, p. 7, 14.

Where it becomes necessary to show the warrant or writ upon which a constable or other officer has acted, it is sufficient

to produce the warrant or writ itself, without proving the judgment or decree upon which it is founded. *Foster*, 311, 312. 1 *East*, P. C. 310. But it is not sufficient to prove the sheriff's warrant to the officer, without producing the writ of *capias*, &c. upon which it issued. *Mead's case*, 2 *Stark. N. P. C.* 205. 2 *Stark. Ev.* 518, 2*d ed.* Where it is requisite to prove that the party was acting under an authority derived from the articles of war, a copy of the articles, printed by the King's printer, must be produced. In several instances, prisoners have been acquitted on a charge of murder for want of such evidence. 2 *Stark. Ev.* 519, 2*d ed.*

Proof of malice—peace officers killed or killing others in performance of their duty—their authority—regularity of process.] Where a peace officer, or other person, having the execution of process, cannot justify without a reliance on such process, it must appear that it is legal. But by this, it is only to be understood that the process, whether by writ or warrant, be not defective in the frame of it, and issue, in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. Though there may have been error or irregularity in the proceedings previous to the issuing of the process, yet if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it; and therefore, if a *ca. sa.* or other writ of the kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for the murder, to produce the writ or warrant, without showing the judgment or decree. *Rogers's case*, *Foster*, 312. So in case of a warrant obtained from a magistrate by gross imposition, and false information touching the matters suggested in it. *Curtis's case*, *Foster*, 135, 311. So though the warrant itself be not in strictness lawful, as if it express not the cause particularly enough, yet, if the matter be within the jurisdiction of the party granting the warrant, the killing of the officer in the execution of his duty is murder; for he cannot dispute the validity of the warrant, if it be under the seal of the justice, &c. 1 *Hale*, *P. C.* 460. In all kinds of process, both civil and criminal, the falsity of the charge contained in such process, that is, the injustice of the demand in the one case, or the party's innocence in the other, will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice. 1 *East*, *P. C.* 310. 1 *Hale*, *P. C.* 457.

But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the party, or if the name of the party or of the officer be inserted without authority, and after the issuing of the process, and the officer in attempting to execute it be killed, this is only manslaughter in the party

whose liberty is invaded. *Foster*, 312. 1 *East*, *P. C.* 310. The prisoner, who had been arrested and rescued, declared that if Welsh, the officer, attempted to arrest him again, he would shoot him. A writ of rescue was made out and carried to the office of Mr. Deacle, who acted for the under-sheriff of the county, to have the warrants made out. The under-sheriff's custom was to deliver to Deacle, sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion should require. Deacle made out a warrant against the prisoner on one of these blank pieces of paper, and delivered it to Welsh, who inserted therein the names of two other persons, on the 12th of July. In executing this warrant, one of these persons, in getting into the house to assist in the arrest, was shot by the prisoner. Upon a reference to the judges, they certified that the offence in point of law amounted only to manslaughter. *Stockley's case*, 1 *East*, *P. C.* 310. So where the name of another sheriff's officer was inserted in a sheriff's warrant, after it had been signed and sealed, the arrest by the substituted officer was held illegal. *Stevenson's case*, 19 *St. Tr.* 846. But where the name of an officer is inserted, before the warrant is sent out of the sheriff's office, it seems the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. 1 *Russell*, 513. Thus where the names of two officers were interlined in a writ of possession, after it was sealed, but before it left the sheriff's office, and in executing it one of the officers was wounded, the party wounding having been indicted under 43 G. 3. c. 58, and convicted, the judges held the conviction right. *Harris's case*, 1 *Russell*, 513. But where a magistrate kept a number of blank warrants ready signed, and on being applied to filled up one of them and delivered it to an officer, who in attempting to make the arrest was killed, it was held that this was murder in the party killing. *Per Lord Kenyon*, *R. v. Inhab. of Winwick*, 8 *T. R.* 454.

Under this head, it may properly be considered how far any defect in the frame of the process, or any other illegality in the arrest, will be a defence to a third person interfering to prevent it, and killing the officer in so doing. The question is put by Mr. East in this form. How far the mere view of a person under arrest, or about to be arrested, supposing it to be illegal, *is of itself* such a provocation to a by-stander, as will extenuate his guilt in killing the officer, in order to set the party free, or prevent the arrest? In the following case it was held, by seven of the judges against five, that it was such a provocation. One Bray, constable of St. Margaret's, Westminster, came into St. Paul's, Covent Garden, and without warrant took up one Ann Dekins, as a disorderly person, though she was innocent. The prisoners, strangers to Dekins, meeting her

in Bray's custody, drew their swords, and assaulted Bray to rescue her; but on his showing his staff, and declaring he was about the Queen's business, they put up their swords, and he carried her to the round-house in Covent-Garden. Soon afterwards the prisoners drew their swords, and assaulted Bray, in order to get the woman discharged. Whereupon Bray called Dent to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners, when one of the prisoners, before any stroke received, gave Dent a mortal wound. All the judges, except one, agreed that Bray acted without any authority; but that one thought showing his staff was sufficient, and that with respect to the prisoners, he was to be considered as a constable *de facto*. But the main point upon which they differed was, whether the illegal imprisonment of a stranger was, under these circumstances, a sufficient provocation to by-standers; or, in the language of Lord Holt, a provocation to all the subjects of England. Five judges held the case to be murder, and thought that it would have been a sufficient provocation to a relation or a friend, but not to a stranger. The other seven judges, who held it to be manslaughter, thought that there was no ground for making such a distinction, and that it was a provocation to all, whether strangers or others, so as to reduce the offence to manslaughter, it being a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue one who was unlawfully restrained of her liberty. *Tooley's case*, 2 *Lord Raym.* 1296. 1 *East, P. C.* 325. The resolution of the seven judges in this case has been commented upon with much force by Mr. Justice Foster. The prisoners, he observes, upon the first meeting, drew their swords upon the constables, who were unarmed, but put them up, appearing, on cool reflection, to be pacified. At the second meeting the constable received his death-wound, before any blow given or offered by him or his party; that there was no pretence of a rescue; for, before the second encounter, the woman had been lodged in the round-house, which the soldiers could not hope to force; so that the second assault upon the constable seemed rather to be grounded upon resentment, or a principle of revenge for what had passed, than upon any hope to rescue the woman. He concludes with expressing an opinion, that the doctrine advanced in this case is utterly inconsistent with the known rules of law, touching a sudden provocation in the case of homicide, and, which is of more importance, inconsistent with the principles upon which all civil government is founded, and must subsist. *Foster*, 314, 315. 1 *East, P. C.* 326. In a very late case also, upon *Tooley's case* being cited, Alderson, J. observed that it had been overruled. *Warner's case*, 1 *Moody, C. C.* 388.

The majority of the judges, in the preceding case, appear to

have grounded their opinion upon two former decisions. The first of these is thus stated by Kelyng. Berry and two others pressed a man without authority. The man quietly submitted, and went along with them. The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry showed them a paper, which the prisoner and his companions said was no warrant, and immediately drawing their swords to rescue the impressed man, thrust at Berry. On this, Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. *Hugget's case, Kel.* 59. Lord Hale's report of this case is more brief. A press-master seized B. for a soldier, and with the assistance of C. laid hold on him; D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C. By the advice of all the judges, except very few, it was ruled that this was but manslaughter. 1 *Hale, P. C.* 465. The judges were, however, divided in opinion, four holding that it was murder, eight that it was manslaughter. *Foster*, 314. Mr. Justice Foster is inclined to rest the authority of this case upon the ground of its having been a sudden quarrel and affray, causing a combat between the prisoner and the assistant of the press-master; and he observes, that Hale, who, at the conference, concurred in opinion with those who held it to be manslaughter only, says nothing touching the provocation which an act of oppression towards individuals might be supposed to give to the by-standers. He admits, however, that the case, as reported in *Kelyng*, does indeed turn upon the illegality of the trespass, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion, to attempt a rescue. *Foster*, 314. The other case, referred to in *Tooley's case*, was that of Sir Henry Ferrers. Sir Henry Ferrers being arrested for debt upon an illegal warrant, his servant, in attempting to rescue him, as was pretended, killed the officer. But, upon the evidence, it appeared that Sir H. Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant, and the servant was acquitted of the murder and manslaughter. *Sir H. Ferrers's case, Cro. Car.* 371. Upon this case, Mr. Justice Foster observes, that from the report it does not appear upon what provocation the quarrel and affray began, and that it is highly probable that no rescue was thought of, or attempted. *Foster*, 313.

This doctrine underwent some discussion in a later case. The prisoner was tried at the Old Bailey, for the murder of an assistant to a constable, who had come to arrest a man named Farmello, (with whom the prisoner cohabited,) as a disorderly person, under 19 G. 2. c. 10. Farmello, though not an object of the act, made no resistance, but the prisoner immediately, on the constable and his assistant requiring Farmello to go along

with them, without any request to desist, and without speaking, stabbed the assistant. Hotham, B., said it was a very different case from what it would have been, if the blow had been given by Farmello himself. If he, when the constable entered the room with an insufficient warrant, had immediately, in his own defence, rather than suffer himself to be arrested, done the deed, the homicide would have been lessened to the crime of manslaughter. The offence also might have been of a different complexion in the eye of the law, if the prisoner had been the lawful wife of Farmello; but standing in the light she did, she was to be considered an absolute stranger to him, a mere stander-by, a person who had no right whatever to be in any degree concerned for him. Thus being a stranger, and having, before any person had been touched, and when the officers had only required Farmello to go with them, and without saying a word to prevent the intended arrest, stabbed the assistant, she was guilty of murder. He then adverted to *Hugget's case*, and *Tooley's case*, (*supra*,) and observed, that the circumstances there were extremely different from those of the present case. Mr. Justice Gould, and Mr. Justice Ashurst, concurred in this opinion; but it was thought fit that the jury should find a special verdict, as the case was one of great importance. A special verdict was accordingly found, and the case was subsequently argued before ten of the judges, but no judgment was given, the prisoner either being discharged, or having made her escape from prison, during the riots in 1780. It is said, that the judges held the case to be manslaughter only. *Adey's case*, 1 *Leach*, 206, 1 *East, P. C.* 329. (*n.*)

Although it is intimated by Lord Hale, as well as by Hotham, B., in the preceding case, that a distinction may exist between the case of servants and friends, and that of a mere stranger, yet it must be confessed, says Mr. East, that the limits between both are no where accurately defined. And, after all, the nearer or more remote connexion of the parties with each other, seems more a matter of observation to the jury, as to the probable force of the provocation, and the motive which induced the interference of a third person, than as furnishing any precise rule of law grounded on such a distinction. 1 *East, P. C.* 292. 1 *Russell*, 500.

Proof of malice—cases of peace-officers killed, or killing others, in the performance of their duty—notice of their authority.] With regard to persons who, in right of their offices, are conservators of the peace, and in that right alone interfere in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties killing them should have some notice with what intent they interpose, otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they came to take a part in it. But in these

cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. And if the officer be within his proper district, and known or generally acknowledged to bear the office which he assumes, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. In the night, some further notification is necessary, and commanding the peace, or using words of the like import, notifying his business, will be sufficient. *Foster*, 310.

A bailiff or constable, sworn in at the leet, is presumed to be known to all the inhabitants or residents who are bound to attend at the leet, and are consequently bound to take notice that he is a constable; 1 *Hale, P. C.* 461; and in such case, the officer, in making the arrest, is not bound to show the warrant. *Id.* 459. But if the constable be appointed in some other way, from which the notoriety of his character could not be presumed, some other circumstances would be required to found the presumption of knowledge. And in the night-time, some notification would be necessary, in the case of a leet constable. But whether in the day or night time, it is sufficient if he declares himself to be the constable, or commands the peace in the king's name. 1 *Hale, P. C.* 461. Where a man, assisting two serjeants-at-mace in the execution of an escape warrant, had been killed, a point was reserved for the opinion of the judges, whether or not sufficient notice of the character in which the constables came had been given. It appeared that the officers went to the shop, where the party against whom they had the warrant, and the prisoner, who was with him, were; and calling out to the former, informed him that they had an escape warrant against him, and required him to surrender, otherwise they should break open the door. In proceeding to do so, the prisoner killed one of the serjeant's assistants. Nine of the judges were of opinion that no precise form of words was required. That it was sufficient that the party had notice, that the officer came not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared in an explicit manner what sort of warrant they had. They said that an escape does not *ex vi termini*, or in notion of law, imply any degree of force or breach of the peace, and consequently the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and they concluded, that, for want of this due notice, the officers were not to be considered as acting in the discharge of their duty. *Curtis's case, Foster*, 135.

With regard to a *private bailiff*, or *special bailiff*, it must either appear that the party resisting was aware of his character, or there must be some notification of it by the bailiff, as by saying *I arrest you*, which is of itself sufficient notice; and it is at

the peril of the party if he kills him after these words, or words to the same effect, and it will be murder. 1 *Hale, P. C.* 461. *Mackally's case,* 9 *Co.* 69. *b.* 1 *Russell,* 518. It is said also, that a private bailiff ought to show the warrant upon which he acts, if it is demanded. 1 *Russell,* 518, *citing* 1 *Hale, P. C.* 583, 458, 459. It seems, however, that this must be understood of a demand made, after submitting to the arrest. The expression in *Hale* (459,) is, "such person must show his warrant, or signify the contents of it;" and it appears, from the authority of the same writer, *supra,* that even the words "I arrest you," are a sufficient signification of the officer's authority.

Proof of malice—cases of peace-officers killed or killing others in the execution of their duty—mode of executing their duty.] In cases of *felony actually* committed, if the offender will not suffer himself to be arrested, but stands upon his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether public officers or private persons, with or without a warrant, he may be lawfully killed by them. *Hawk. P. C. b.* 1. *c.* 28. *s.* 11. Where, says Mr. Justice Foster, a felony is committed, and the felon flies from justice, and a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if, in the pursuit, the party flying is killed, *where he cannot be otherwise overtaken,* it is justifiable homicide. *Foster,* 271.

In case an innocent person is *indicted for felony,* and will not suffer himself to be arrested by the officer *who has a warrant for that purpose,* he may be lawfully killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer. *Hawk. P. C. b.* 1. *c.* 28. *s.* 12. It seems, however, that a constable, or other peace-officer, is bound to arrest a person *indicted* of felony, *without a warrant,* and that, therefore, if it be not possible otherwise to apprehend him, he will be justified in killing him, although he have no warrant. *See* 1 *East, P. C.* 300.

Whether or not a peace officer who attempts, without a warrant, to apprehend a person on *suspicion of felony* will be justified in killing him, in case he cannot otherwise apprehend him, is a case requiring great consideration. Even in the instance of breaking open the outward door of a house, a peace officer is not justified, unless he is acting under a warrant, in proceeding to that extremity; *Foster,* 321, *and vide, post,* 629; still less could he be justified in a matter concerning life. However, according to Lord Hale, the officer would be justified in killing the party if he fly, and cannot otherwise be apprehended. 2 *Hale, P. C.* 72, 80.

In cases of *misdemeanors,* the law does not admit the same severe rule as in that of felonies. The cases of arrests for mis-

demeanors and in civil proceedings, are upon the same footing. *Foster*, 271. If a man charged with a misdemeanor, or the defendant in a civil suit flies, and the officer pursues, and in the pursuit kills him, it will be murder. 1 *Hale, P. C.* 481. *Foster*, 471. Or rather, according to Mr. Justice Foster, it will be murder or manslaughter, as circumstances may vary the case. For if the officer in the heat of the pursuit, and merely to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should ensue, it seems that this would amount to no more than manslaughter, and in some cases not even to that offence. But if he had made use of a deadly weapon, it would have amounted to murder. *Foster*, 271.

If persons engaged in a riot or forcible entry or detainer, stand in their defence, and continue the force in opposition to the command of a justice of the peace, &c. or resist such justice endeavouring to arrest them, the killing of them may be justified, and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them or defend themselves from them. *Hawk. P. C. b.* 1. *c.* 28. *s.* 14.

It is to be observed, that in all the above cases where the officer is justified by his authority, and exercises that authority in a legal manner, if he be resisted, and in the course of that resistance is killed, the offence will amount to murder.

With regard to the point of time at which a constable or other peace officer is justified, in case of resistance, in resorting to measures of violence, it is laid down, that although in the case of common persons, it is their duty when they are assaulted to fly as far as they may, in order to avoid the violence, yet a constable or other peace officer, if assaulted in the execution of his duty, is not bound to give way, and if he kills his assailant, it is adjudged homicide in self defence. 1 *Hale, P. C.* 481. This rule holds in the case of the execution of civil process as well as in apprehensions upon a criminal charge. *Hawk. P. C. b.* 1. *c.* 28. *s.* 17. But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. Therefore where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door post, of which she died; although the court held her opposition to them to be a sufficient provocation to extenuate the homicide, yet, they were clearly of opinion that the prisoner was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and the officer kills, it will be murder. So if the officer kills the party after the resistance is over, and the necessity has ceased, it is manslaughter, at least, and if the blood had time to cool, it would, it seems, be murder. 1 *East, P. C.* 297.

In respect to the time of executing process, it may be done at night as well as by day, and therefore killing a bailiff, or other officer, under pretence of his coming at an unseasonable hour, would be murder. But since the statute 29 Car. 2. c. 7. s. 6. all process warrants, &c. served or executed on a Sunday, are void, except in cases of treason, felony, or breach of the peace, and therefore an arrest on any other account, made on that day, is the same as if done without any authority at all. 1 *East*, P. C. 324.

In executing their duty, it often becomes a question in what cases constables and other peace officers are justified in breaking open windows and doors. In no case whatever is an officer justified in breaking an outward door, or window, unless a previous notification has been given, and a demand of entrance made and refused. *Foster*, 320. *Hawk. P. C. b.* 2. *c.* 14. *s.* 1.

Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender without any warrant, but in cases of misdemeanors and breach of the peace, a warrant is required; it likewise seems to be the better opinion that mere suspicion of felony will not justify him in proceeding to this extremity, unless he be armed with a warrant. *Foster*, 320, 321. *Hawk. P. C. b.* 2. *c.* 14. *s.* 7. 1 *Russell*, 520. *Sed vide* 1 *Hale*, P. C. 583. 2 *Id.* 92.

In cases of writs, an officer is justified in breaking an outer door upon a *capias*, grounded on an indictment for any crime whatever, or upon a *capias* to find sureties for the peace, or the warrant of a justice for that purpose. *Hawk. P. C. b.* 2. *c.* 14. *s.* 3. So upon a *capias utlagatum*, or *capias pro fine*; Id. 1 *Hale*, P. C. 459, or upon an *habere facias possessionem*; 1 *Hale*, P. C. 458, or upon the warrant of a justice of the peace for levying a forfeiture in execution of a judgment or conviction. *Hawk. P. C. b.* 2. *c.* 14. *s.* 5.

If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a constable having notice of it, and demanding entrance, and being refused, and the affray continuing, may break open the doors to keep the peace. 2 *Hale*, P. C. 95. *Hawk. P. C. b.* 2. *c.* 14. *s.* 8. And if there be disorderly drinking or noise in a house, at an unseasonable hour of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 *Hale*, P. C. 95. 1 *East*, P. C. 322. So if affrayers fly to a house, and he follows them with fresh suit, he may break open the doors to take them. *Hawk. P. C. b.* 1. *c.* 63. *s.* 16. But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant, and it is said, that at least there must be some circumstance of

extraordinary violence to justify him in so doing. 1 *Russell*, 273, *(n.)*

In civil suits an officer cannot justify the breaking open an outward door or window to execute the process; if he do break it open, he is a trespasser. In such case, therefore, if the occupier resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose to himself and his family. It is not murder, because it was unlawful for the officer to break into the house, but it is manslaughter because he knew him to be a bailiff. Had he not known him to be a bailiff, it would have been no felony, because done in his house. 1 *Hale, P. C.* 458. This last instance, says Mr. East, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent, and that the party did not know or had reason to believe that he was only a trespasser. 1 *East, P. C.* 321, 322.

The privilege is confined to the *outer doors* and windows only—for if the sheriff or a peace officer enter a house by the outer door, being open, he may break open the inner doors, and the killing him in such case would be murder. 1 *Hale, P. C.* 458. If the party whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may break open any inner doors or windows to search for them, without demanding admission. *Per Gibbs, J. Hutchison v. Birch*, 4 *Taunt.* 619. But it seems that if the party against whom the process has issued be not within the house at the time, the officer must demand admittance before he will be justified in breaking open an inner door. *Ratcliffe v. Burton*, 3 *Bos. & Pul.* 223. So if the house be that of a stranger, the justification of the officer will depend upon the fact of the goods or the person, against whom he is proceeding, being in the house at the time. *Cooke v. Birt*, 5 *Taunt.* 765. *Johnson v. Leigh*, 6 *Taunt.* 240. 1 *Russell*, 521.

An officer attempting to attach the goods of the prisoner in his dwelling house, put his hand over the hatch of the door, which was divided into two parts, the lower hatch being closed, and the higher open. A struggle ensued between the officer and a friend of the prisoner, in the course of which, the officer having prevailed, the prisoner shot at and killed him, and this was held murder. *Baker's case*, 1 *East, P. C.* 323. In the above case there was proof of a previous resolution in the prisoner to resist the officer whom he afterwards killed. 1 *East, P. C.* 323.

The privilege likewise extends only to those cases where the occupier or any of his family, who have their domestic or ordinary residence there, are the objects of the arrest; and if a stranger, whose ordinary residence is elsewhere, upon pursuit,

takes refuge in the house of another, such house is no castle of *his*, and he cannot claim the benefit of sanctuary in it. *Foster*, 320, 321, 1 *East*, *P. C.* 323. But this must be taken subject to the limitation already expressed with regard to breaking open inner doors in such cases, *viz.* that the officer will only be justified by the fact of the person sought being found there. *Ante*, *p.* 630, 1 *East*, *P. C.* 324.

The privilege is also confined to arrests *in the first instance*; for if a man legally arrested (and laying hands on the prisoner, and pronouncing words of arrest, constitute an actual arrest), escape from the officer, and take shelter in his own house, the officer may, upon fresh pursuit, break open the outer door, in order to retake him, having first given due notice of his business, and demanded admission, and having been refused. If it be not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate. 1 *Hale*, *P. C.* 459. *Foster*, 320. 1 *East*, *P. C.* 324.

Proof of malice—cases of officers killed or killing others in the execution of their duty—mode (where an officer is killed) in which that killing has been effected.] It is a matter of very serious consideration, whether in all cases where a peace officer or other person is killed, while attempting to enforce an illegal warrant, such killing shall, under circumstances of great cruelty or unnecessary violence, be deemed to amount to manslaughter only. In *Curtis's case*, *Foster*, 135, *ante*, *p.* 626, the prisoner being in the house of a man named Cowling, who had made his escape, swore that the first person who entered to retake Cowling should be a dead man, and, immediately upon the officers breaking open the shop door, struck one of them on the head with an axe, and killed him. This was held murder, and a few of the judges were of opinion that even if the officers could not have justified breaking open the door, yet that it would have been a bare trespass in the house of Cowling, without any attempt on the property or person of the prisoner; and admitting that a trespass in the house, with an intent to make an unjustifiable arrest of the owner, could be considered as some provocation to a by-stander, yet surely the knocking a man's brains out, or cleaving him down with an axe, on so slight a provocation, savoured rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty, and it ought always to be remembered, that in all cases of homicide upon sudden provocation, the law indulges to human frailty, and to that alone. So in *Stockley's case*, *ante*, *p.* 622, the fact that the prisoner deliberately resolved upon shooting Welsh, in case he offered to arrest him again, was, it has been argued, sufficient of itself to warrant a conviction for murder, independently of the legality of the warrant. 1 *East*, *P. C.* 311.

When a bailiff, having a warrant to arrest a man, pressed

early into his chamber with violence, but not mentioning his business, and the man not knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword hanging in his chamber, and stabbed the bailiff, whereof he died; this was held not to be murder, for the prisoner did not know but that the party came to rob or kill him, when he thus violently broke into his chamber without declaring his business. 1 *Hale, P.C.* 470. A bailiff having a warrant to arrest C. upon a *ca. sa.* went to his house, and gave him notice. C. threatened to shoot him if he did not depart, but the bailiff disregarding the threat, broke open the windows, upon which C. shot and killed him. It was ruled, 1, that this was not murder, because the bailiff had no right to break the house; 2, that it was manslaughter, because C. knew him to be a bailiff; but, 3, had he not known him to be a bailiff, it had been no felony, because done in defence of his house. *Cook's case*, 1 *Hale, P. C.* 458, *Cro. Car.* 537, *W. Jones*, 429.

These decisions would appear to countenance the position that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation, this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced so manslaughter. In *Thomson's case*, 1 *Moody, C. C.* 80, *ante*, *p.* 613, where the officer was about to make an arrest on an insufficient charge, the judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in *Stockley's case*, (*ante*, *p.* 622), and *Curtis's case*, (*ante*, *p.* 626), the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such cases from the operation of the general rule, (*vide ante*, *p.* 604), that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "It may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer." 1 *East, P. C.* 328.

It may be remarked that this question is fully decided in the Scotch law, the rule being as follows: — In resisting irregular or defective warrants, or warrants executed in an irregular way,

or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. *Alison's Princ. Cr. Law of Scotl.* 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 *Hume*, 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of these, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only. *Alison's Princ. Cr. Law of Scotl.* 28.

In case of death ensuing, where resistance is made to officers in the execution of their duty, it sometimes becomes a question how far the acts of third persons, who take a part in such resistance, or attempt to rescue the prisoner, shall be held to affect the latter. If the party who is arrested yield himself, and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, it is murder in them, but not in the party arrested; otherwise, if he do any act to countenance the violence of the rescuers. *Stanley's case, Kel.* 87, 1 *Russell*, 450. Jackson and four other robbers being pursued by the hue and cry, Jackson turned round upon his pursuers, the rest being in the same field, and refusing to yield, killed one of them. By five judges who were present, this was held murder, and inasmuch as all the robbers were of a company, and made a common resistance, and one animated the other, all those who were of the company in the same field, though at a distance from Jackson, were all principals, *viz.* present, aiding, and abetting. They also resolved, that one of the malefactors being apprehended a little before the party was hurt, and being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated Jackson to kill the party. 1 *Hale, P. C.* 464. Where A. beat B., a constable, in the execution of his duty, and they parted, and then C., a friend of A., fell upon the constable, and killed him in the struggle, but A. was not engaged in the affair, after he parted from B., it was held that this was murder only in C., and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to ill-use the constable. *Anon.* 1 *East, P. C.* 296.

It is a matter of fact, for the jury in these cases, to determine

in what character the third party intervened. If he interfered for the purpose of aiding the person in custody to rescue himself, and in so doing killed the bailiff, it would be murder, but if, not knowing the cause of the struggle, he interposed with intent to prevent mischief, it would not amount to murder. 1 *East, P. C.* 318. 1 *Russell*, 450, *See Kel.* 86, *Sid.* 159.

Proof of malice—private persons, killed or killing others, in apprehending them.] The rules regarding the protection of private persons who take upon themselves to arrest offenders, is much more confined than that which is applicable to peace officers and others, who act only in the execution of their duty. It must, however, be remembered, that where a private person lends his assistance to a constable, whether commanded to do so or not, he is under the same protection as the officer himself. *Foster*, 309.

So in cases of felony actually committed, or a dangerous wound given, private persons may apprehend without a warrant, and will be protected, so that the killing of them in executing that duty, will be murder; but it is otherwise, where there is merely a reasonable suspicion of a felony, *ante*, *p.* 560, 612.

Whether or not a private person ought to enjoy the protection extended to peace officers, where he proceeds to arrest a person who stands *indicted* of felony, does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such case, because a person innocent may be indicted, and because there is another way of bringing him to answer, *viz.* process of *capias* to the sheriff, who is a known responsible officer. 2 *Hale, P. C.* 84. The reasoning of Mr. East, however, is rather in favour of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavour to arrest him, in order to bring him to justice, it cannot be truly said, that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons if it may be made without the death of the felon. (*Dalton, c.* 170. *s.* 5.) And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose be *primâ facie* evidence of the fact, till the contrary should be proved. 1 *East, P. C.* 300.

There is one class of misdemeanors in which private persons are justified in interposing, and are under the same protection as peace officers, namely, in case of sudden affrays to part the combatants, and to prevent mischief; but in these cases they must give express notice of their friendly intent, and if the party interposing with such notice, is killed by the affrayers, it will

be murder in the party killing. *Foster*, 272, 311. And it is said by Hawkins, that perhaps private persons may justify the killing of dangerous rioters, when they cannot otherwise suppress them or defend themselves from them, inasmuch as every person seems to be authorised by law, to arm himself for such purposes. *Hawk. P. C. b.* 1. *c.* 28. *s.* 14. And this was so resolved by all the judges in Easter Term, 39 Eliz., though they thought it more discreet for any one in such a case to attend and assist the king's officer in so doing. *Poph.* 121. 1 *East, P. C.* 304. It is said by Hawkins, that at common law every private person may arrest any suspicious *night walker*, and detain him till he give a good account of himself. *Hawk. P. C. b.* 2. *c.* 13. *s.* 6. But it is doubtful how far such a power is vested even in peace officers, (*vide ante, p.* 615,) and it is still more doubtful with regard to private persons. *See* 1 *Russell*, 506.

In general, in cases of misdemeanor, except in those abovementioned, a private person will not be justified in apprehending the offender, and if in attempting to apprehend him he kill him, it will be murder. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun to take the ghost, and upon meeting with a person dressed in white, immediately shot him. Macdonald, C. B., Rooke, and Lawrence, Js., were clear that this was murder, as the person who appeared to be a ghost, was only guilty of a misdemeanor, and no one might kill him, although he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the Court said that they could not receive that verdict, and told the jury that if they believed the evidence, they must find the prisoner guilty of murder: and that if they did not believe the evidence, they should acquit the prisoner. The jury found the prisoner guilty, and sentence was pronounced, but he was afterwards reprieved. *Smith's case*, 1 *Russell*, 459. 4 *Bl. Com.* 201, (*n.*)

By various statutes, private persons are authorised to make arrests, as the owners of property injured, and their servants, under the 7 & 8 G. 4. cc. 29 & 30, *ante, p.* 616.

Gamekeepers, &c. have authority to arrest in certain cases by stat. 9 G. 4. c. 69. s. 2, by which it is enacted, that where any person shall be found upon any land, committing any such offence as is *thereinbefore* mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor, or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons therein mentioned, or any person assisting such gamekeeper or servant to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his

being conveyed before two justices of the peace, and in case such offender shall assault or offer any violence with any gun, cross-bow, fire arms, bludgeon, stick, club, or other offensive weapon whatsoever, towards any persons thereby authorised to seize or apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, &c.

Under this statute it has been held, that a gamekeeper, &c., is entitled to arrest a party for an offence under the 9th section, though the above clause (s. 2,) speaks only of offences *thereinbefore* mentioned, for an offence under s. 9, is an offence also under s. 1. *Ball's case*, 1 *Moody, C. C.* 330. A gamekeeper and his assistants warned a party of poachers off his master's grounds, and followed them into the highway, where the poachers rushed upon the keeper and his men, and blows ensued on both sides. After the keeper had struck several blows, a shot was fired by the prisoner, one of the party, which wounded the prosecutor. The prisoner was indicted under the 9 G. 4. c. 31, for shooting at the prosecutor with intent to kill, &c. It was urged for the prisoner, that as the keeper had knocked down three of the men before the shot was fired, it would have been manslaughter only if death had ensued; but the judge (Bayley B.) was of opinion that if the keeper struck, not vindictively, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him, it would have been murder if death had ensued. He told the jury that he thought the keeper and his men, even if they had no right to apprehend, had full right to follow the prisoner and his party, to discover who they were, and that the prisoner and his party were not warranted in attempting to prevent them, and that if they had attempted to apprehend them, which, however, they did not, he thought they would have been warranted by the statute in so doing. The prisoner being convicted, on a case reserved, the judges were of opinion that the keeper had power to apprehend, and that notwithstanding the blows given by the keeper, it would have been murder, had the keeper's man died. *Ball's case*, 1 *Moody, C. C.* 330. The rule laid down in the above case, with regard to blows first given by the keeper in self-defence, was soon afterwards recognized in another case. *Ball's case*, 1 *Moody, C. C.* 333.

A gamekeeper and his assistants proceeded to apprehend a party of poachers, whose guns they heard in a wood. They rushed in upon the poachers, who ran away, and the keeper followed, one of the poachers exclaiming, "the first man that comes out, I'll be damn'd if I don't shoot him." At length several of the poachers stopped, and the prisoner, one of them, putting his gun to his shoulder, fired at and wounded the prosecutor; being indicted for this offence, it was objected that it was incumbent on the prosecutor to have given notice to the persons by calling upon them to surrender, which he did not

appear to have done ; the judge reserved the point, and the judges were all of opinion that the circumstances constituted sufficient notice, and that the conviction was right. *Payne's case*, 1 *Moody, C. C.* 378.

Upon an indictment for murder, it appeared that the prisoner, being poaching at night in a wood, was attempted to be apprehended by the deceased, the servant of the prosecutor. The prosecutor was neither the owner nor occupier of the wood, nor the lord of the manor, having only the permission of the owner to preserve game there. The deceased having been killed by the prisoner in the attempt to apprehend him, it was held to be manslaughter only. *Addis's case*, 6 *C. & P.* 388.

In these cases a question frequently arises, how far the companions of the party who actually committed the offence participate in the guilt. The prisoners were charged with shooting James Mancey, with intent to murder. It appeared that the prisoners, each having a gun, were out at night in the grounds of C. for the purpose of shooting pheasants, and the prosecutor and his assistants going towards them for the purpose of apprehending them, they formed into two lines, and pointing their guns at the keepers, threatened to shoot them. A gun was fired, and the prosecutor was wounded. Some of the keepers were also severely beaten, but no other shot was fired. It was objected that as there was no common intent to commit any felony, Mancey alone could be convicted, but Vaughan B. said, "I am of opinion that when this act of parliament (57 *G.* 3. *c.* 90, *repealed by* 9 *G.* 4. *c.* 69,) empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power which the law affords to constables in the execution of their duty. With respect to the other point, it is rather a question of fact for the jury ; still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it." *Edmeads's case*, 3 *C. & P.* 390. So when two persons had been seized by a gamekeeper and his assistants, and while standing still in custody, called to another man, who coming up, rescued the two men, and beat and killed one of the keeper's party, Vaughan B. ruled that all the three men were equally guilty, though, if the two had acquiesced and remained passive, it would not have been so. *Whithorne's case*, 3 *C. & P.* 394.

Proof of malice—killing in defence of person or property.] The rule of law upon this subject is thus laid down by Mr.

East. A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavours by *violence* or *surprise* to commit a known felony, such as rape, robbery, arson, burglary, or the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it is justifiable self-defence; as on the other hand, the killing by such felons, of any person so lawfully defending himself, will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act, indicative of such an intention, will not warrant him in killing that other by way of precaution, there being no actual danger at the time. 1 *East, P. C.* 271, 2.

Not only is the party himself, whose person or property is the object of the felonious attack justified in resisting, in the manner above mentioned, but a servant or any other person may lawfully interpose, in order to prevent the intended mischief. Thus in the instances of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do, but subject to the same limitations. (*Sed vide post, p.* 644.) In this case there seems to be no difference between the case of the person assaulted, and those who come in aid against such felons. The legislature itself seems to have considered them on the same footing, for in the case of the Marquis de Guiscard, who stabbed Mr. Harley while sitting in council, they discharged the party who gave the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (9 Ann. c.16.) 1 *East, P. C.* 289. *Foster*, 274. *Cooper's case, Cro. Car.* 544.

With regard to the nature of the intended offence, to prevent which, it is lawful instantly to use the last violence, and to put the assailant to death, it is only to such crimes as in their nature betoken an urgent necessity, which admits of no delay, that the rule extends. Of this nature are what have been termed *known* felonies, in contradistinction as it seems to such secret felonies as may be committed without violence to the person, such as picking the pocket, &c. *Foster*, 274. 1 *East, P. C.* 273. Where an attempt is made to murder, or to rob, or to ravish, or to commit burglary, or to set fire to a dwelling-house, if the attack be made by the assailant with violence and by surprise, the party attacked may lawfully put him to death. *Ibid.*

A statute was passed in the 24 Hen. 8. (c. 5.) upon this subject, in affirmance of the common law. After reciting that it had been doubted whether if any person should attempt feloniously to rob or murder any persons in or near any common, high-way, cartway or footway, or in their mansions, messuages, or dwelling places, or attempt to break any dwelling-house in

the night time, and should happen in such felonious intent to be slain by those whom they should so attempt to rob or murder, or by any person being in their dwelling-house attempted to be broken open, the person so happening to slay the person so attempting to commit murder or burglary, should forfeit goods and chattels; enacts that if any person or persons be indicted or appealed, of or for the death of any such evil disposed person or persons attempting to rob, murder, or burglarily to break mansion-houses, as is above-said, the person or persons so indicted or appealed thereof, and of the same by verdict so found and tried, shall not forfeit or lose any lands, tenements, goods, or chattels, for the death of any such evil disposed person in such manner slain, but shall be thereof, and for the same, fully acquitted and discharged. Though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide, which stand upon the same footing of reason and justice. Thus the killing of one who attempts the wilful burning of a house, is free from forfeiture, without the aid of the statute; and though it only mentions the breaking a house in the night time, (which must be intended a breaking accompanied with a felonious intent,) yet, a breaking in the day time with a like purpose must be governed by the same rule. 1 *East*, *P. C.* 272, 3.

The rule extends to *felonies* only. Thus if one comes to beat another, or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him, it will be manslaughter. 1 *Hale*, *P. C.* 485, 486. 1 *East*, *P. C.* 272.

It is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified in making the resistance, as in the following case. Levet being in bed and asleep, his servant, who had procured Frances Freeman to help her in her work, went to the door, about twelve o'clock at night, to let her out, and conceived she heard thieves about to break into the house. Upon this she wakened her master, telling him what she apprehended. He took a drawn sword, and the servant fearing that Freeman should be seen, hid her in the buttery. Mrs. Levet seeing Freeman in the buttery, and not knowing her, conceived her to be the thief, and called to her husband, who entering the buttery in the dark, and thrusting before him with his sword, struck Freeman under the breast, of which wounds she instantly died. This was ruled to be misadventure only. *Levet's case*, *Cro. Car.* 538. 1 *Hale*, *P. C.* 42, 474. Possibly, says Mr. Justice Foster, this might have been ruled manslaughter, due circumspection not having been used. *Foster*, 299.

Whether a person who is *assaulted* by another will be justified

in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault, and the circumstances under which it is committed. It may be of such a character that the party assailed may reasonably apprehend death, or great violence to his person, as in the following case:—Ford being in possession of a room at a tavern, several persons persisted in having it, and turning him out, but he refused to submit, when they drew their swords upon Ford and his company, and Ford, drawing his sword, killed one of them, and it was adjudged justifiable homicide. Both in Kelyng and in Foster a *quære* is added to this case. But Mr. East observes, that though the assailants waited till Ford had drawn his sword (which by no means appears), yet if more than one attacked him at the same time (and as he was the only one of his party who seems to have resisted, such probably was the case), the determination seems to be maintainable. *Ford's case, Kel.* 51. 1 *East, P. C.* 243. So in *Mawgridge's case* great violence was held justifiable in the case of a sudden assault. Mawgridge, upon words of anger, threw a bottle with great force at the head of Cope, and immediately drew his sword. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him, whereupon Mawgridge stabbed Cope, which was ruled to be murder; for Mawgridge, in throwing the bottle, showed an intention to do some great mischief, and his drawing immediately showed that he intended to follow up the blow. *Mawgridge's case, Kel.* 128. 2 *Lord Raym.* 1489. *Fost.* 296. Upon this case, Mr. East has made the following remarks:—The words previously spoken by Cope could form no justification for Mawgridge, and it was reasonable for the former to suppose his life in danger, when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life, and this at a time when he was off his guard, and without any warning. The latter circumstance furnishes a main distinction between this case and that of death ensuing from a combat, where both parties engage upon equal terms, for then, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon, suspend his arm till he has warned the other, and given him time to put himself upon his guard, and afterwards they engage upon equal terms; in such case it is plain that the intent of the person making such assault is not so much to destroy his adversary, at all events, as to combat with him, and run the hazard of losing his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood. But if several attack a person at once with deadly weapons, as may be supposed to have happened in *Ford's case, (supra)*, though they wait till he be upon his guard, yet it seems (there being no compact to fight)

that he would be justified in killing any of the assailants in his own defence, because so unequal an attack resembles more a desire of assassination than of combat. 1 *East, P. C.* 276.

An assault with intent to *chastise*, although the party making the assault has no legal right to inflict chastisement, will not justify the party assaulted in killing the assailant. The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night in question. His father ordered him to go to bed, but he refused, upon which a scuffle ensued between them. The deceased, a brother of the prisoner, who was in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him, and beat him, the prisoner not being able to avoid his blows, or to make his escape. As they were struggling together, the prisoner gave his brother a mortal wound with a penknife. This was unanimously held by the judges to be manslaughter, as there did not appear to be any inevitable necessity so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to chastise him for his misbehaviour to his father. *Nailor's case*, 1 *East, P. C.* 277. The circumstances in the following case were very similar. The prisoner and the brother of the prosecutor were fighting, on which the prosecutor laid hold of the prisoner to prevent him from hurting his brother, and held him down, but did not strike him, and the prisoner stabbed him with a knife above the knee. The prisoner being indicted for stabbing under 9 G. 4. c. 31, Mr. Justice James Parke said, The prosecutor states that he was merely restraining the prisoner from beating his brother, which was proper on his part. If you are of opinion that he did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck the prisoner any blows, then I think that it would. You will consider whether any thing was done by the prosecutor more than necessary, or whether he gave any blows before he was struck. *Bourne's case*, 5 *C. & P.* 120.

At the conference of the judges upon *Nailor's case*, (*supra*), Powell, J., by way of illustration, put the following case:—If A. strike B. without any weapon, and B. retreat to a wall, and there stab A., it will be manslaughter, which Holt, C. J., said was the same as the principal case, and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, without some dangerous weapon, that the intent of the aggressor rose so high as the death of the party struck, and unless there be a plain manifestation of a felonious intent, no *assault*, however violent, will *justify* killing the assailant under the plea of necessity. 1 *East, P. C.* 277.

But in order to render the killing in these cases justifiable, it

must appear that the act was done from mere necessity, and to avoid the immediate commission of the offence. Thus a person who, in the case of a mutual conflict, would excuse himself upon the ground of self-defence, must show that before the mortal stroke given, he had declined any further combat, and retreated as far as he could with safety, and that he had killed his adversary through mere necessity, and to avoid immediate death. If he fail in either of these circumstances, he will incur the penalty of manslaughter. *Foster*, 277.

Again, to render the party inflicting death under the foregoing circumstances justifiable, it must appear that he was wholly without any fault imputable to him by law in bringing the necessity upon himself. Therefore, where A., with many others, had, on pretence of title, forcibly ejected B. from his house, and B. on the third night returned with several persons with intent to re-enter, and one of B.'s friends attempted to fire the house, whereupon one of A.'s party killed one of B.'s with a gun, it was held manslaughter in A., because the entry and holding with force were illegal. *Hawk. P. C. b.* 1. *c.* 28. *s.* 22.

It is to be observed, that killing in defence of the person will amount either to justifiable or *excusable homicide*, or *chance-medley*, as the latter is termed, according to the circumstances of the case. Self-defence, upon chance-medley, implies that the party, when engaged in a sudden affray, quits the combat before a mortal wound is given, and retreating as far as he can with safety, urged by necessity, kills his adversary for the preservation of his own life. *Foster*, 276. It has been observed, that this case borders very nearly upon manslaughter, and that in practice the boundaries are in some instances scarcely perceptible. In both cases, it is presumed that the passions have been kindled on both sides, and that blows have passed between the parties; but in manslaughter, it is either presumed that the combat has continued on both sides till the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. *Foster*, 276, 277. The true criterion between manslaughter and excusable homicide, or chance-medley, is thus stated by Sir William Blackstone. When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence. 4 *Bl. Com.* 184.

In all cases of excusable homicide, in self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice. For if one attack another with a dangerous weapon, unprepared, with intent to murder him, that would stand upon a different ground; and, in that case, if the party, whose life was sought, killed the other, it

would be in self-defence, properly so called. But if the first assault be *open malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for the flight rather aggravates the crime, as it shows more deliberation. 1 *East, P. C.* 282.

Where a trespass is committed merely against the property of another, and without any felonious intent, the law does not admit the force of the provocation to be sufficient to warrant the owner of the property to make use, in repelling the trespasser, of any deadly or dangerous weapon. Thus, if upon the sight of a person breaking his hedges, the owner were to take up a hedge-stake and knock him on the head, and kill him, this would be murder; because the violence was much beyond the provocation. *Foster*, 291, 1 *East, P. C.* 288. *vide supra.* However provoking the circumstances of the trespass may be, they will not justify the party in the use of deadly weapons. Lieutenant Moir, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a gun at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. He had gone home for a gun, on seeing the trespasser, but no personal contest had ensued. Being indicted for murder, he was found guilty, and executed. *Moir's case*, 1828.

But if the owner use only a weapon not likely to cause death, and with intent only to chastise the trespasser, and death ensue, this will be manslaughter only. *Foster*, 291, 1 *East, P. C.* 288.

Where a person is set to watch premises in the night, and shoots at and kills another who intrudes upon them, the nature of the offence will depend upon the reasonable grounds which the party had to suspect the intentions of the trespasser. Any person, said Garrow B., in a case of this kind, set by his master to watch a garden or yard, is not at all justified in shooting at, or injuring in any way, persons who may come into those premises even in the night, and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened; and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter. *Scully's case*, 1 *C. & P.* 319.

The rules, with regard to the defence of the possession of a house, are thus laid down. If A., in defence of his house, kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life. But if B. had entered the house, and A. had gently laid his hands upon him to turn him out, and then B. had

turned upon him and assaulted him, and A. had killed him, (not being otherwise able to avoid the assault, or retain his lawful possession,) it would have been in self-defence. So if A. had entered upon him, and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser, to gain the possession, in such a case, A. being in his own house, need not fly as far as he can, as in other cases of self-defence, for he has the protection of his house to excuse him from flying, as that would be to give up the possession of his house to his adversary. But in this case, the homicide is excusable rather than *justifiable*. 1 *East, P. C.* 287. 1 *Hale, P. C.* 445. *Cook's case, Cro. Car.* 537, *ante, p.* 632.

In the following case, Bayley, J. seems to have been of opinion that a *lodger* does not enjoy the privilege which, as above stated, is possessed by the owner of a house, of standing to its protection without retreating. Several persons tried to break open the door of a house in which the prisoner lodged. The prisoner opened the door, and he and the parties outside began to fight. The prisoner was taken into the house again by another person, but the parties outside broke open the door in order to get at the prisoner, and a scuffle again ensued, in which the deceased was killed by the prisoner with a pair of iron tongs. There was a back-door through which the prisoner might have escaped, but it did not appear that he knew of it, having only come to the house the day before. Bayley, J. said, If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back-door, it would have been his duty to go out backwards, in order to avoid the conflict. *Dakin's case, Lewin, C. C.* 166. *Sed vide ante, p.* 638.

Upon an indictment for manslaughter, it appeared that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow; they exerted force, a scuffle ensued, in which the prisoner received a blow on the breast; whereupon she threw a stone at the deceased, upon which he fell down, and was taken up dead. Holroyd, J. said, The case fails on two points; it is not proved that the death was caused by the blow, and if it had been, it appears that the deceased received it in an attempt to invade the prisoner's barn against her will. She had a right to defend the barn, and to employ such force as was reasonably necessary for that purpose, and she was not answerable for any unfortunate accident that might happen in so doing. The prisoner was acquitted. *Hinchcliffe's case, Lewin, C. C.* 161.

So where the owner of a public-house was killed in a struggle between him and those who unlawfully resisted his turning

them out of his house, it was held murder. Two soldiers came at eleven o'clock at night to a publican's and demanded beer, which he refused, alleging the unreasonableness of the hour, and advised them to go to their quarters, whereupon they went away uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company detained on business, one of the soldiers rushed in, the other remaining without, and renewed his demand for beer, to which the landlord returned the same answer. On his refusing to depart, and persisting in having some beer, and offering to lay hold of the deceased, the latter at the same instant collared him, and the one pushing, the other pulling towards the outer door, the landlord received a violent blow on the head from some sharp instrument from the other soldier, which occasioned his death. Buller, J. held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence of the prisoners' having come a second time, with a deliberate intention to use personal violence, in case their demand was not complied with. *Willoughby's case*, 1 *East*, *P. C.* 288.

The following case illustrates various points which may arise in questions respecting the defence of property. The prisoners were indicted for murder; Meade for having shot one Law with a pistol, and Belt as having been present aiding and abetting him. It appeared that Meade had rendered himself obnoxious to the boatmen at Scarborough, by giving information to the excise, of certain smuggling transactions in which some of them had been engaged; and the boatmen, in revenge, having met with him on the beach, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. The boatmen, however, as he was going away called to him, that they would come at night and pull his house down. His house was about a mile from Scarborough. In the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention; and Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Law, one of the party, was killed. The only evidence against Belt was, that he was in the house when the pistol was fired, and a voice having been heard to cry out "fire," it was assumed that it was his voice. Per Holroyd, J. to the jury—A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters into the dwelling of another. But a man is not authorised to fire a

pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity. But, the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault, but no words or singing are equivalent to an assault, nor will they authorise an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence, if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person in the heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as where a party coming up by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If, in the present case, you are of opinion that the prisoners were really attacked, and that Law and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, they were perhaps justified in firing as they did; if you are of opinion that the prisoners intended to fire over and frighten, then the case is one of manslaughter, and not of self-defence. With regard to Belt there is no evidence one way or the other, whether there was or was not any other person in the house with Meade, although there is no doubt that he was there, you are not, however, to assume, in a case where a man's life is at stake, that, because a man's voice was heard, it was the voice of Belt. *Meade's case, Lewin, C. C.* 184.

Proof in cases of felo de se.] It is only necessary in this place to notice the law respecting *self-murder* so far as it affects third persons. If one person persuade another to kill himself, and the latter do so, the party persuading is guilty of murder, and if he persuade him to take poison, which he does in the absence of the persuader, yet the latter is liable as a principal in the murder. 1 *Hale, P. C.* 431. 4 *Rep.* 81. b. The prisoner was indicted for the murder of a woman by drowning her. It appeared that they had cohabited for several months previous to the woman's death, who was with child by the prisoner. Being in a state of extreme distress, and unable to pay for their lodgings, they quitted them on the evening of the day in which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster bridge to drown themselves in the Thames. They got into a boat, and afterwards went into another boat,

the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water, but whether by actually throwing himself in or by accident, did not appear. He struggled and got back into the boat again, and then found that the woman was gone. He endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate, he said, he intended to drown himself, but dissuaded the woman from following his example. The judge told the jury, that if they believed the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner, but if they both went to the water for the purpose of drowning themselves, each encouraging the other in the commission of a felonious act, the survivor was guilty of murder. He also told the jury, that though the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated their opinion to be, that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. On a reference to the judges, they were clear, that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of the previous agreement, he was principal in the second degree, and guilty of murder, but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either, and the prisoner was recommended for a pardon. *Dyson's case, Russ. & Ry.* 523.

If a woman takes poison with intent to procure a miscarriage and dies of it, she is guilty of self-murder, and a person who furnishes her with poison for that purpose, will, if absent when she took it, be an accessory before the fact only, and as he could not have been tried as such before 7 G. 4. c. 64. s. 9, he is not triable for a substantive felony under that act. An accessory before the fact to self-murder was not triable at common law, because the principal could not be tried, nor is he now triable under 7 G. 4. c. 64. s. 9, for that section does not make accessories triable except in cases in which they might have been tried before.

MURDER — ATTEMPT TO COMMIT — MAIMING, &c.

Offences at common law 648
Offences by statute 649
Proof of attempt to poison 649
Proof of attempt to drown 650
Proof of shooting with intent to murder . . . 650
Proof of stabbing or cutting 651
Proof of wounding 652
Proof of the intent in general . . . 653
to murder 654
to maim and disfigure 654
to do some grievous bodily harm . . . 655
to prevent lawful apprehension . . . 656
Principals—aiding and abetting . . . 657

MURDER, &c.—ATTEMPT TO COMMIT.

Under this head head will be considered the evidence with regard to the several offences mentioned in the 11th and 12th sections of the statute 9 Geo, 4. c. 31. including not only attempts to murder by poisoning, shooting, &c, but likewise attempts to maim, &c. The circumstance that all the offences mentioned in sec. 12, are likewise mentioned in sec. 11, and differ only with regard to *intent*, renders it unnecessary to consider the authorities separately.

Many of the cases illustrating this head, have been already stated under the title "*Murder.*" In order to bring the case within the statute 9 Geo. 4, c. 31, it is necessary that the circumstances should be such that, had death ensued, the offence would have been murder. The decisions therefore are equally applicable to both heads, and many of them are necessarily classed under that of "*Murder.*"

Offence at common law.] At common law an attempt to commit murder was a high misdemeanour; 1 *East, P. C.* 411; but now, this offence is provided for by the 9 Geo. 4 c. 31, s. 11, by which it is enacted, that if any person or persons unlawfully and maliciously shall administer or attempt to administer to any person, or shall cause to be taken by any person any poison, or other destructive thing, or shall unlawfully and

maliciously attempt to drown, suffocate, or strangle any person; or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab or wound any person with intent in any of the cases aforesaid to murder such person, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

By 9 Geo. 4. c. 31. s. 12, it is enacted, that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall unlawfully and maliciously stab, cut, or wound any person, with intent in any of the cases aforesaid to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person; or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony; and being convicted thereof, shall suffer death as a felon: provided always that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts of shooting or attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of the crime of felony.

Upon an indictment framed on the 11th section of the act, the prosecutor must prove, 1st; the malicious act, *viz.* the attempt to poison, or the shooting, &c. and 2ndly, the intent to murder. Upon an indictment on the 12th section, he must prove, 1st, the malicious act (which is the same as in the 11th section, with the exception of attempts to poison, or to drown, suffocate, or strangle) and 2ndly, the intent, which is of three different kinds, *viz.*—1st, to maim, disfigure, or disable; 2dly, to do some other grievous bodily harm, and 3dly, to prevent the lawful apprehension or detainer of the party offending or of any of his accomplices.

Proof of attempts to poison.] Under Lord Ellenborough's act, 43 Geo. 3. c. 48. s. 1, (which did not contain the words *attempt to administer,*) it was held that to constitute the offence of *administering poison*, some of the poison must be taken by, or applied to the person to whom it is administered, and that merely giving it, if no part was taken or applied, was not

sufficient. It was at the same time held that if any part was taken, it was not necessary to complete the offence that it should be swallowed. *Cadman's case*, 1 *Moody, C. C.* 114. *See* 6 *C. & P.* 372. It seems, however, that this would now be considered an "attempt to administer," within the 9 G. 4. c. 31. A servant put poison into a coffee pot, and when her mistress came down to breakfast, told her that she had put the coffee pot there for her, and the mistress drank of the poisoned coffee. Upon an indictment for "administering and causing to be administered" the poison, Park J. ruled, that it was not necessary in order to constitute an "administering," that there should be a delivery by the hand, and that this was "a causing to be taken," within the 9 Geo. 4. *Harley's case*, 4 *C. & P.* 369. When A. sent poison, intending it for B. with intent to kill B., and it came into the possession of C. who took it, but did not die, Gurney B. held this case within the statute. *Lewis's case*, 6 *C. & P.* 161.

Proof of attempt to drown, &c.] No reported case is to be found on the construction of this part of the 9 Geo. 4. c. 31. A similar enactment occurs in the 10 Geo. 4. c. 38, relating to Scotland, and upon this it has been observed that the clause regarding attempts to suffocate, strangle, or drown, requires only the application of personal violence, with the intent to murder, &c. and does not also require a serious injury to the person. It will be sufficient therefore if the accused have laid hold of another, and attempted to throw him into a draw well, or deep river, or has striven to strangle or suffocate him, although no lasting injury has resulted from the attempt. *Alison's Prin. Crim. Law of Scotl.* 171.

Proof of shooting, &c. with intent to murder.] Under Lord Ellenborough's act, the words of which are substantially the same as those of the 9 Geo. 4. c. 31, it was ruled, that firing at a person with a gun loaded with paper and powder only, might be within the statute. In a case of this kind, Le Blanc, J. directed the jury that though the pistol was loaded with gun-powder and paper only, if the prisoner fired it so near to the person of the prosecutrix, and in such a direction that it would probably kill her, or do her some grievous bodily harm, and with intent that it should do so, the case was within the statute; but he desired them, in case they found the prisoner guilty, to say whether they were satisfied that the pistol was loaded with any destructive material besides gun-powder and paper or not. The jury found the prisoner guilty, and said they were satisfied that the pistol was loaded with some other destructive material. The prisoner being convicted, the judges on a case reserved, held the conviction right. *Kitchen's case, Russ. & Ry.* 95. Upon an indictment under the same

statute, for priming and levelling a blunderbuss, loaded with gun-powder and leaden shot, and attempting by drawing the trigger to discharge the same, with intent to murder, the jury found that the blunderbuss was not primed when the prisoner drew the trigger, but found the prisoner guilty. On a case reserved, a majority of the judges considered the verdict of the jury as equivalent to a finding by them, that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn, and if such were the case, they were of opinion in point of law, that it was not loaded within the meaning of the statute. *Carr's case, Russ. & Ry.* 377. So upon an indictment under the 9 G. 4. c. 31, for attempting to discharge a loaded pistol, by drawing the trigger, with intent, &c. the defence was, that the touch-hole was plugged. Patteson J. said to the jury, If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms within the meaning of the act. *Harris's case*, 5 *C. & P.* 159. Where the indictment alleges that the pistol was loaded with powder and a leaden bullet, it must appear that it was loaded with a bullet, or the prisoner will be acquitted. *Hughes's case*, 5 *C. & P.* 126. and *see Whitley's case, Lewin, C. C.* 123.

Proof of stabbing or cutting.] Lord Ellenborough's act, 43 Geo. 3. c. 58, did not contain, like the new statute, the word *wound* in the corresponding enactment. The words are all intended to express a different mode of inflicting the injury. Thus where the prisoner was indicted under 43 G. 3. for *striking and cutting* with a bayonet, and the surgeon stated that the wound was a *punctured* triangular one, the prisoner being convicted, the judges, on a case reserved, were of opinion, that as the statute used the words in the alternative "stab" or "cut" so as to distinguish between them, the distinction must be attended to in the indictment, and they held the conviction wrong. *M'Dermot's case, Russ. & Ry.* 356. A striking over the face with the sharp or claw end of a hammer, producing a wound or cut, was held to be a *cutting* within the same statute. *Atkinson's case, Ibid.* 104. It is not necessary in order to render the injury a *cutting* that it should be effected with an instrument adapted for the purpose of cutting, and, therefore, when it was inflicted with an iron adapted for the purpose of forcing open doors, drawers, chests, &c., the prisoner being convicted of *cutting*, the judges held the conviction to be correct. *Hayward's case, Russ. & Ry.* 78.

But a blow from a square iron bar, which inflicted a contused or lacerated wound, has been held not to be a *cutting* within the act. *Adam's case, cor. Lawrence, O. B.* 1 *Russell*, 597. So where a similar wound was given on the head by a blow with the metal

scabbard of a sword, by a yeomanry man (the sword being in the scabbard at the time.) *Whitfield's case, cor. Bayley, J.* 1 *Russell*, 597. So a blow with the handle of a windlass, though it made an incision. *Anon. cor. Dallas*, 5 *Ev. Coll. Stat. part v. p.* 334, (*n.*) 1 *Russell*, 597. The authority of these latter cases may perhaps be doubted since the decision of *Atkinson's case* (*supra*), in which the *nature of the injury*, and not of *the instrument*, appears to have been considered the proper test of decision. *See* 2 *Stark. Ev.* 500 (*n.*), 2*d ed.*

Proof of wounding.] Where the prisoner is indicted for a *wounding*, it must appear that the skin was broken, a mere contusion is not sufficient. Where the prisoner had struck the prosecutor with a *bludgeon*, and the skin was broken, and blood flowed, Patteson J. said, that it was not material what the instrument used was, and held the case to be within the statute. *Payne's case*, 4 *C. & P.* 558. In a case which occurred before Littledale J. on the Oxford circuit, he directed a prisoner to be acquitted, it not appearing that the skin was broken or incised. *Anon. cited* 1 *Moody, C. C.* 280. *See Moriarty v. Brooks*, 6 *C. & P.* 684. But in a case which came soon afterwards before Park J., where there was no proof of an incised wound, the learned judge told the jury that he was clearly of opinion that it need not be an incised wound, for that he believed the act of parliament (9 G. 4.) had introduced the word *wound* for the purpose of destroying the distinction, which, as the words in the old statute were only *stab or cut*, it was always necessary to make, between contused and incised wounds, and that it was not necessary either that the skin should be broken or incised, or that a cutting instrument should be used, for that otherwise the thing intended to be remedied by the new act would remain as before. The prisoner being found guilty, the case was reserved for the decision of the judges, amongst whom there was considerable discussion and difference of opinion. Lord Tenderden said he thought the word *wound* was not introduced to cure the difficulty whether a cutting or stabbing instrument was used. In this case, from the continuity of the skin not being broken, it was thought by all, except Bayley B. and Park J., that there was no wound within the act, and that the conviction was wrong. *Wood's case*, 1 *Moody, C. C.* 278, 4 *C. & P.* 381. Where the prisoner was indicted under the 9 G. 4. for cutting and wounding the prosecutor, with intent, &c., and it appeared that he threw a hammer at him, which struck him on the face, and broke the skin for an inch and a half, the prisoner being convicted, a case was reserved for the opinion of the judges, whether the injury could be considered either as a stab, cut, or wound, within the true construction of the statute, and it was unanimously resolved by those who were present, that the case amounted to a *wound* within the statute, and that the conviction was right. *Withers's case*, 1 *Moody, C. C.* 294, 4 *C. & P.* 446.

The means or instrument by which the wound was effected need not be stated, and if stated, do not confine the prosecutor to the proof of wounding by such means. The prisoners were indicted for wounding with a stick and with their feet. The jury found them guilty, but stated that they could not tell whether the wound was caused by a blow with the stick or a kick with a shoe. On a case reserved, the judges were unanimously of opinion that the means by which the wound was inflicted need not have been stated, that it was mere surplusage to state them, and that the statement did not confine the crown to the means stated, but might be rejected as surplusage, and that whether the wound was from a blow with a stick, or a kick from a shoe, the indictment was equally supported. *Briggs's case*, 1 *Moody, C. C.* 318.

Proof of the intent in general.] The intent must be proved as laid. Thus where the prisoner was charged with cutting, &c., with intent to murder, maim, and disable, and the jury found that the intent was to commit a robbery, and that the prisoner cut and maimed the watchman, with intent to disable him, till *he could effect his own escape*; the prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was wrong, for, by the finding of the jury, the prisoner intended only to produce a temporary disability, till he could escape, and not a permanent one. *Boyce's case*, 1 *Moody, C. C.* 29. But where the prisoner was charged with shooting with intent to do A. B. some grievous bodily harm, and the jury found that the prisoner's motive was to prevent his lawful apprehension, but that in order to effect that purpose, he had also the intention of doing A. B. some grievous bodily harm, the prisoner being convicted, the judges held that if both the intents existed, it was immaterial which was the principal, and which the subordinate, and that the conviction was right. *Gillow's case*, 1 *Moody, C. C.* 85, *and see Williams's case*, 1 *Leach*, 533.

In estimating the prisoner's real intentions, says Mr. Starkie, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does. If with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention were to destroy. It is not, however, essential to the drawing such an inference that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound

was inflicted on a part where it could not have proved mortal, provided the criminal intention can be inferred from other circumstances. 2 *Stark. Ev.* 500, 2*d ed.* citing *R. v. Case, coram* Park J., who said that it had been so held by the judges.

Where the question is whether the shooting was by accident or design, evidence that the prisoner at another time maliciously shot at the prosecutor is admissible. *Voke's case, Russ. & Ry.* 531, *stated ante, p.* 71. So in the case of poisoning, evidence of former as well as of subsequent attempts of a similar kind, may be received. 2 *Stark. Ev.* 501, 2*d ed.*

Proof of intent to murder.] Where the prisoner is charged under the 9 Geo. 4. with shooting, &c. with intent to murder, and from the circumstances it appears that if death had ensued it would have been manslaughter only, he must be acquitted; *Mytton's case,* 1 *East, P. C.* 411; and in such a case he could not be convicted of a common assault upon that indictment, the offence charged therein being a felony. But where the charge is that of making an assault with intent to murder, the defendant, in case the intent is not proved, may be convicted of the common assault. *See* 2 *Stark. Ev.* 500. (*n.*) 2*d ed.*

Proof of the intent to maim, disfigure, or disable.] A maim, at common law, is such a bodily hurt as renders a man less able in fighting to defend himself, or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal ability, it does not fall within the crime of mayhem. Upon this distinction the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or fore tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his nose or ears is not so at common law. 1 *East, P. C.* 393.

Though the primary intent of the offender be of a higher and more atrocious nature, *viz.* to murder, and in that attempt he does not kill, but only maims the party, it is an offence within the 12th sec.; for it is a known rule of law, that if a man intend to commit one kind of felony, and in the prosecution of that commit another, the law will connect his felonious intention with the felony actually committed, though different in species from that he originally intended. 1 *East, P. C.* 400. The following case was decided upon the Coventry act, 21 & 22 Car. 2. c. 1, (repealed by 9 Geo. 4. c. 31.) which, like the 9 Geo. 4. contained the words "with intent to maim or disfigure." The prisoners were indicted for slitting the prosecutor's nose, with intent to maim him. In their defence they insisted that their intent was to murder him, and not to maim him; and that, therefore, they were not within the statute, but Lord King said, that the intention was a matter of fact to be collected from all the circumstances of the case, and as

such was proper to be left to the jury; and that if it were the intention of the prisoners to murder, it was to be considered whether the means made use of to accomplish that end, and the consequences of those means, were not likewise in their intention and design; and whether every blow and cut were not intended, as well as the object for which the prisoners insisted they were given. The prisoners were found guilty. Upon this case, Mr. Justice Yates has observed, that it seemed to him that the whole aim of this defence, allowing the intention to be what the prisoners contended, was insufficient, and that an intention more criminal and malignant could not excuse them from one which was less so. On the conference, however, of the judges in *Carroll's case*, Willes, J. and Eyre, B. expressed some dissatisfaction with this case, and thought, at least, the construction ought not to be carried further. *Coke's case*, 1 *East*, *P. C.* 400. 6 *St. Tr.* 212, 219, 222, 228. *See Cox's case, post, p.* 656.

To *disable*, signifies the infliction of a permanent disability; therefore, where the indictment charges an intent to disable, and it appears that the prisoner only intended to disable the party till he could effect his own escape, it is not within that part of the statute. *Boyce's case*, 1 *Moody*, *C. C.* 29.

Proof of intent to do some grievous bodily harm.] It is not necessary either to prove malice in the prisoner against the person injured, or that any grievous bodily harm was in fact inflicted; all that is necessary is to prove the stabbing, cutting, or wounding, and the *intent* required by the statute. The prisoner having been apprehended by one Headley, in an attempt to break open his stable in the night, was taken into Headley's house, where he threatened him with vengeance, and endeavoured to carry his threats into execution with a knife, which lay before him; in so doing he cut the prosecutor, one of Headley's servants, who, with Headley, was trying to take away the knife. The jury, who found the prisoner guilty, stated, that the thrust was made with intent to do grievous bodily harm to any body upon whom it might alight, though the particular cut was not calculated to do so. Upon the case being submitted to the consideration of the judges, they were of opinion, that general malice was sufficient under the statute, without particular malice against the person cut; and that if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done. *Hunt's case*, 1 *Moody*, *C. C.* 93. This case appears to have resolved the doubts expressed by Mr. Justice Bayley, in a case previously tried before him. *Akenhead's case*, *Holt*, *N. P. C.* 469. The same construction, with regard to general malice, was put upon the Coventry act. *See Carroll's case*, 1 *East*, *P. C.* 394, 396.

Where the prisoner, in attempting to commit a robbery, threw down the prosecutor, kicked him, and produced blood,

Denman, C. J. left it to the jury to say, whether his intent was to *disable* the prosecutor, or to do him so me grievous bodily harm; adding that nothing was more likely to accomplish the robbery which he had in view, than the disabling which such violence would produce. *Shadbolt's case*, 5 *C. & P.* 504.

The intent to do grievous bodily harm will be proved, although the prisoner had also an intent to commit another felony. Thus where, on an indictment, charging the prisoner with cutting M. E., with intent to do her some grievous bodily harm, it appeared that the prisoner cut the private parts of a girl, ten years of age, Graham, B. told the jury, that they were to consider whether this was not a grievous bodily injury to the child, though eventually not dangerous. As to the intent, though it probably was the prisoner's intention to commit a rape, yet, if to effect the rape, he did that which the law makes a distinct crime, *viz.* intentionally did the child a grievous bodily harm, he was not the less guilty of that crime, because his principal object was another. He added, that the intention of the prisoner might be inferred from the act. The jury found the prisoner guilty, and, on a case reserved, the judges held the conviction right. *Cox's case*, *Russ. & Ry.* 362; *and see Gillow's case*, 1 *Moody, C. C.* 85, *ante*, *p.* 653.

Proof of intent—to prevent lawful apprehension or detainer.] The statute only makes it an offence when the injury is done to prevent a *lawful* apprehension or detainer; and therefore, the prosecutor must show that the arrest, or intended arrest, was legal. *Duffin's case*, *Russ. & Ry.* 365. The prisoner having previously cut a person on the cheek, several others, who were not present when the transaction took place, went to apprehend him without any warrant, and, upon their attempting to take him into custody, he stabbed one of them. Le Blanc, J. was of opinion that the prosecution could not be sustained. He said that, to constitute an offence within this branch of the statute, there must be a resistance to a person having lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence was committed, or must be armed with a warrant. (*Vide ante*, *p.* 614.) This branch of the statute was intended to protect officers and others armed with authority, in the apprehension of persons guilty of robberies or other felonies. *Dyson's case*, 1 *Stark. N. P. C.* 246.

In order to render a party guilty of the offence of wounding, &c. with intent to prevent his lawful apprehension, it must appear that he had notice of the authority of the officer; for, if he had no such notice, and death had ensued, it would only be manslaughter. *Ante*, *p.* 625. Some wheat having been stolen, was concealed in a bag in a hedge. The prisoner and another man came into the field, and took up the bag. They were pursued by the prosecutor, who seized the prisoner without

desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before the prosecutor had spoken, the prisoner drew a knife and cut him across the throat. On an indictment for cutting, with intent to prevent apprehension, Lawrence, J. said, As the prosecutor did not communicate to the prisoner the purpose for which he seized him, the case does not come within the statute. If death had ensued, it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion. The prisoner must be acquitted on this indictment. *Rickett's case*, 3 *Campb.* 68; *and see ante*, *p.* 625. But where, in a case somewhat similar to the preceding, the goods had been concealed by the thief in an out-house, and the owner, together with a special constable under the watch and ward act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night, and *removed* the goods from the place where they were deposited, and upon an attempt to apprehend them the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice "Stop thief," and on being overtaken the prisoner drew a knife, with which he cut the hands of the prosecutor, and made several attempts to cut his throat, the prisoner was convicted and executed. *Robinson's case, cor. Wood, B.* 2 *Stark. Ev.* 501, (*n.*) *2d ed.*; *and see ante*, *p.* 625, *as to notification of an officer's character, &c.*

Proof of the intent—principals aiding and abetting.] Where several persons are engaged in the commission of a felony, and one of them commits an offence within the above statute, a question arises how far the others are to be considered as sharing in his guilt. Where three persons, engaged in committing a felony, were surprised by the watchman, and two of them made their escape, and the third *afterwards*, in attempting to make his escape in a different direction, cut the watchman; upon an indictment, charging both him and one of the other prisoners (Richardson,) with an offence under the 43 G. 3., Graham, B. directed the jury, that if the prisoners came with the same illegal purpose, and both determined to resist, the act of one would fix guilt upon both, and that it might have been part of the plan to take different ways. The prisoners were found guilty; but, on a case reserved, the judges were of opinion that there was no evidence against Richardson. *White's case, Russ. & Ry.* 99.

Two private watchmen, seeing the prisoner and another person with their carts loaded with apples, went to them, intending, as soon as they could get assistance, to secure them; one walking at the side of each of the men. The other man wounded the watchman near him. The prisoner being indicted for this offence, under the 9 G. 4., it was held that the jury must be

satisfied that he and the other man had not only gone out with a common purpose of stealing apples, but also of resisting with violence any attempt to apprehend them. *Collison's case*, 4 *C. & P.* 565.

It is not necessary, in order to convict the prisoner, that he should appear to be the person who actually fired the shot. In an indictment, on the 43 G. 3., the three first counts stated, in the usual form, that J. S. did shoot at A. B., and went on to state that M. and N. were present aiding and abetting. The three last counts stated that an unknown person did shoot at A. B. &c., and that J. S. and M. and N. were present aiding and abetting the said unknown person in the felony aforesaid, to do and commit, and were then and there knowing of and privy to the commission of the said felony, against the statute, &c.; but they omitted to charge them with being feloniously present, &c. There was no evidence to show that J. S. was the person who fired. It was objected that the prisoners could not be convicted on the first set of counts, because the jury had negatived the firing by J. S.; nor on the second set, because the word "feloniously" was omitted. Graham, B., said that the objection was founded upon a supposed difference in the act of shooting, &c., and the being present, &c. at it; whereas the act of parliament had made no degrees, no difference of offence, and that the plain meaning and necessary construction of the act was, that if the parties were present, knowing, &c., they and every one of them shot, and that the charge of *feloniously* shooting applied to every one of them. The prisoners being convicted, all the judges thought that the conviction was right. *Towle's case*, *Russ. & Ry.* 314.

NUISANCE.

Proof of the public nature of the nuisance . 659
Proof of the degree of annoyance which constitutes a public nuisance 659
Proof with regard to situation . . . 660
Proof with regard to length of time . . 661
Proof of particular nuisances . . . 662
Particular trades . . . 662
Rail-ways and steam-engines . . 662

Acts tending to produce public disorder, and acts of public indecency 663
Disorderly inns 663
Gaming-houses 663
Bawdy-houses 664
Play-houses 664
Gunpowder and fireworks 665
Dangerous animals 665
Contagion, and unwholesome provisions . 665
Eaves dropping—common scold . . . 665
Proof of the liability of the defendant . 666

A public or common nuisance is such an inconvenient or troublesome offence as annoys the whole community in general, and not merely some particular person; and therefore this is indictable only, and not actionable. 4 *Bl. Com.* 167.

Proof of the public nature of the nuisance.] The existence of the matter as a *public* nuisance depends upon the number of persons annoyed, and is a fact to be judged of by a jury. *White's case*, 1 *Burr.* 337. Thus where a tinman was indicted for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three sets of chambers in Clifford's Inn, and that the noise might be partly excluded by shutting the windows, Lord Ellenborough ruled that the indictment could not be maintained, as the annoyance, if any thing, was a private nuisance. *Lloyd's case*, 4 *Esp.* 200. But a nuisance near the highway, whereby the air thereabouts is corrupted, is a public nuisance. *Pappeneau's case*, 1 *Str.* 686.

Making great noises in the night, as with a speaking-trumpet, has been held to be an indictable offence, if done to the disturbance of the neighbourhood. *Smith's case*, 1 *Str.* 704. So keeping dogs which make noises in the night is said to be indictable. 2 *Chitty's Cr. Law*, 647.

How far the fact, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is an answer to an indictment for a nuisance, does not appear to be well settled. *See Russell's case*, 6 *B. & C.* 566, *ante*, *p.* 454. *Morris's case*, 1 *B. & Ad.* 447. *Pease's case*, 4 *B. & Ad.* 42, *post* 662.

Proof of the degree of annoyance which will constitute a public nuisance.] It is a matter of some difficulty to define the degree of annoyance which is necessary to constitute a public nuisance. Upon an indictment for a nuisance, in making great quantities of offensive liquors near the king's highway, it appeared in evi-

dence that the smell was not only intolerably offensive, but also noxious and hurtful, giving many persons headaches. It was held, that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable. *White's case*, 1 *Burr.* 333. So it is said, that the carrying on of an offensive trade is indictable, where it is destructive of the health of the neighbourhood, or renders the houses untenantable or uncomfortable. *Davey's case*, 5 *Esp.* 217. So it was ruled, by Abbott C. J., in the case of an indictment for carrying on the trade of a varnish-maker, that it was not necessary that a public nuisance should be injurious to health; that if there were smells offensive to the senses, it was enough, as the neighbourhood had a right to pure and fresh air. *Neil's case*, 2 *C. & P.* 485.

Proof—with regard to situation.] A question of considerable difficulty frequently presents itself, as to the legality of carrying on an offensive trade in the neighbourhood of similar establishments, and as to the length of time legalising such a nuisance. Where the defendant set up the business of a melter of tallow in a neighbourhood where other manufactories were established, which emitted disagreeable and noxious smells, it was ruled that he was not liable to be indicted for a nuisance, unless the annoyance was much increased by the new manufactory. *B. Neville's case, Peake*, 91. And it has also been ruled, that a person cannot be indicted for *continuing* a noxious trade which has been carried on in the same place for nearly fifty years. *S. Neville's case, Peake*, 93. But upon this case it has been observed, that it seems hardly reconcileable to the doctrine, that no length of time can legalise a public nuisance, although it may supply an answer to an action by a private individual. 1 *Russ.* 297; *vide post, p.* 661. It should seem, continues the same writer, that, in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. With regard to offensive works, though they may have been originally established under circumstances which would *primâ facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements, which would make them less offensive, may be indictable. 1 *Russell*, 297.

In a late case, of an indictment for carrying on the business of a horse-boiler, it appeared that the trade had been carried on for many years before the defendants came to the premises; but its extent was much greater under them. For the defendants, it was shown that the neighbourhood was full of horse-boilers and other noxious trades, and evidence was given of the trade being carried on in an improved manner. Lord Tenter-

den observing, that there was no doubt that this trade was in its nature a nuisance, said, that, considering the manner in which the neighbourhood had always been occupied, it would not be a nuisance, unless it occasioned more inconvenience, as it was carried on by the defendants, than it had done before. He left it, therefore, to the jury to say whether there was any increase of the nuisance; if, in consequence of the alleged improvements in the mode of conducting the business, there was no increase of annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance, and the defendants must be convicted. *Watts's case, Moo. & Mal. N. P. C.* 281.

If a noxious trade is already established in a place, remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it, that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases, the party is entitled to continue his trade, because it was legal before the erecting of the houses in the one case, and the making of the road in the other. *Per Abbott C. J. Cross's case,* 2 *C. & P.* 483.

Proof—with regard to length of time.] No length of time will legitimate a nuisance; and it is immaterial how long the practice has prevailed. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of longer standing. *Weld v. Hornby,* 7 *East,* 199. Thus upon an indictment for continuing a stell fishery across the river at Carlisle, though it appeared that it had been established for a vast number of years, yet Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated. *Case cited by Lord Ellenborough,* 3 *Campb.* 227. So it is a public nuisance to place a woodstack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. *Fowler v. Sanders, Cro. Jac.* 446. In one case, however, Lord Ellenborough ruled, that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used as a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. Under these circumstances, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. *Smith's case,* 4 *Esp.* 111.

Proof of particular nuisances—particular trades.] Certain trades, producing noxious and offensive smells, have been held to be nuisances, when carried on in a populous neighbourhood, as making candles in a town by boiling stinking stuff, which annoys the whole neighbourhood with stenches. *Tohayle's case, cited Cro. Car.* 510; but see 2 *Roll. Ab.* 139, *Hawk. P. C. b.* 1. *c.* 75. *s.* 10. And it seems that a brewhouse erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance; and so in the case of a glass-house or swine yard. *Hawk. P. C. b.* 1. *c.* 75. *s.* 10. *Wigg's case*, 2 *Lord Raym.* 1163. So a manufactory for making spirit of sulphur, vitriol, and aqua fortis, has been held indictable. *White's case*, 1 *Burr.* 333. So a tannery where skins are steeped in water, by which the neighbouring air is corrupted. *Pappineau's case*, 1 *Str.* 686.

Proof of particular nuisances—railways—steam engines, &c.] Where an act of parliament gave a company power to make a railway, and another act gave unqualified power to use locomotive steam-engines on the railway, and the railway was constructed in some parts within five yards of a highway, upon an indictment for a nuisance, stating that horses passing along the highway were terrified by the engines, it was held that this interference with the rights of the public must be presumed to have been sanctioned by the legislature, and that the benefit derived by the public from the railway showed that there was nothing unreasonable in the act of parliament giving the powers. *Pease's case*, 4 *B. & Ad.* 30. But when the defendant, the proprietor of a colliery, without the authority of an act of parliament, made a railway from his colliery to a sea-port town, upon the turnpike way, which it narrowed in some places, so that there was not room for two carriages to pass, although he gave the public (paying a toll) the use of the railway, yet it was held that the facility thereby afforded to traffic was not such a convenience as justified the obstruction of the highway. *Morris's case*, 1 *B. & Ad.* 441.

The proceedings in indictments for nuisances by steam-engines are regulated by statute 1 & 2 Geo. 4. c. 41. By sec. 1, the court by which judgment ought to be pronounced in case of a conviction upon any such indictment (*viz.* for a nuisance arising from the improper construction or negligent use of furnaces employed in the working of steam-engines), is authorised to award such costs as shall be deemed proper and reasonable to the prosecutor, such award to be made before or at the time of pronouncing final judgment. And by the second section, if it shall appear to the court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful, without the consent of the pro-

secutor, to make such order touching the premises as shall by the court be thought expedient for preventing the nuisance in future, before passing final sentence. By the third section the act is not to extend to furnaces erected for the purpose of working mines.

Proof of particular nuisances acts tending to produce public disorder—acts of public indecency.] Common stages for rope-dancers, and common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons to the inconvenience of the neighbourhood. *Hawk. P. C. b.* 1. *c.* 75. *s.* 6. So collecting together a number of persons in a field, for the purpose of pigeon-shooting, to the disturbance of the neighbourhood, is a public nuisance. *Moore's case*, 3 *B. & Ad.* 184. It is upon this same principle that many of the acts after-mentioned have been held to be public nuisances.

What outrages public decency, and is injurious to public morals, is indictable as a misdemeanor. *Hawk. P. C. b.* 1. *c.* 75. *s.* 4. 1 *Russell*, 302. Thus bathing in the open sea, where the party can be distinctly seen from the neighbouring houses, is an indictable offence. *Crunden's case*, 2 *Campb.* 89. *Sedley's case*, *Sid.* 168.

Proof of particular nuisances—disorderly inns.] Every one, at common law, is entitled to keep a public inn, (but if it be an ale-house, he comes within the statutes concerning ale-houses;) and may be indicted and fined, as guilty of a public nuisance, if he usually harbour thieves or suffer frequent disorders in his house, or take exorbitant prices, or refuse to receive a traveller as a guest into his house, or to find him victuals upon the tender of a reasonable price. *Hawk. P. C. b.* 1. *c.* 78. *s.* 1, 2. It is said also that setting up a new inn where there is already a sufficient number of ancient and well governed inns, is a nuisance. *Id.* 3 *Bac. Ab. Inns*, (A.) 1 *Russell*, 298.

Proof of particular nuisances—gaming houses.] The keeping a common gaming house is an indictable offence, for it not only is an encouragement to idleness, cheating, and other corrupt practices, but it tends to produce public disorder by congregating numbers of people. *Hawk. P. C. b.* 1. *c.* 75. *s.* 6. 1 *Russell*, 299. A *feme covert* may be convicted of this offence. *Hawk. P. C. b.* 1, *c.* 92, *s.* 30. Keeping a common gaming house, and for lucre and hire unlawfully causing and procuring divers evil disposed persons to frequent and come to play together a certain game, called *rouge et noir*, and permitting the said idle and evil disposed persons to remain, playing at the said game, for divers large and excessive sums of money, is a sufficient statement of an offence indictable at common law. *Rogier's case*, 1 *B. & C.*

272; and *per Holroyd J.* it would have been sufficient merely to have alleged that the defendant kept a common gaming house. *Ibid.*

It seems that the keeping of *a cockpit* is not only an indictable offence at common law, but such places are considered gaming houses within the statute 32 Hen. 8. c. 9. *Hawk. P. C. b.* 1. *c.* 92. *s.* 92.

The proceedings against persons keeping gaming houses, bawdy houses, or disorderly houses, are facilitated by the statute 25 Geo. 2. c. 36, by the eighth section of which it is enacted, that any person who shall appear, act, or behave as the master or mistress, or as the person having the care, government, or management of any bawdy house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof. By section 9, inhabitants of the parish or place, though bound by recognizance, may give evidence upon the prosecution. By section 10, no indictment shall be removed by *certiorari*. This clause does not prevent the crown from removing the indictment. *Davies's case*, 5 *T. R.* 626.

Proof of the particular nuisance—bawdy houses.] The keeping of a bawdy house is a common nuisance, both on the ground of its corrupting public morals, and of its endangering the public peace, by drawing together dissolute persons. *Hawk. P. C. b.* 1. *c.* 74. *s.* 1. 5 *Bac. Ab. Nuisances*, (A.) 1 *Russell*, 299. A *feme covert* is punishable for this offence as much as if she were sole. *Ibid. Williams's case*, 1 *Salk.* 383. And a lodger who keeps only a single room for the use of bawdry is indictable for keeping a bawdy house; but the bare solicitation of chastity is not indictable. *Hawk. P. C. b.* 1. *c.* 74. *s.* 1. Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts, *see Clarke v. Periam*, 2 *Atk.* 339, it being, in fact, a cumulative offence, *vide ante*, *p.* 66. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment. *J'Anson v. Stuart*, 1 *T. R.* 754. 1 *Russell*, 302.

When the house is described as being situated in a particular parish, this being matter of description, must be proved as laid.

The proceedings in prosecutions against bawdy houses are facilitated by statute 25 Geo. 2. c. 36, *supra*.

Proof of particular nuisances—play-houses.] Play-houses having been originally instituted with the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but

may become so by drawing together numbers of people to the inconvenience of the neighbourhood. *Hawk. P. C. b.* 1. *c.* 75. *s.* 7. *see* 2 *B. & Ad.* 189. By statute 25 G. 2. c. 36, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London, or Westminster, or within twenty miles thereof, without a licence from the magistrates, shall be deemed a disorderly house, and the keeper is subjected to a penalty of 100*l.*, and is otherwise punishable as the law directs, in cases of disorderly houses.

Proof of particular nuisances— gunpowder, &c.] Things likely to be productive of injury to the persons of those residing in the neighbourhood, are nuisances, as the erecting of gunpowder mills, or the keeping a gunpowder magazine near a town. *Williams's case*, 4 *Burn's Justice*, 758. *Taylor's case*, 2 *Str.* 1167, *and see* 12 *G.* 3. *c.* 61. So by 10 W. 3. c. 7, the making, selling, or exposing to sale any fireworks, or throwing, or firing them into any public street, or highway, is declared to be a common nuisance.

Proof of particular nuisances—dangerous animals.] Suffering fierce and dangerous animals, as a fierce bull-dog, which is used to bite people, to go at large, is an indictable offence. 4 *Burn's Justice*, 578. But where the animal is not of such a description as in general, from its ferocity, to endanger the persons of those it meets, in order to maintain an indictment, it must be shown that the owner was aware of the ferocity of that particular animal. 2 *Ld. Raym.* 1582.

Proof of particular nuisances—contagion, and unwholesome provisions.] It is an indictable offence to expose a person having a contagious disease, as the small-pox, in public. *Vantandillo's case*, 4 *M. & S.* 73. *Burnett's case*, *Id.* 272. So it is a nuisance for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells. *Dixon's case*, 3 *M. & S.* 11.

Proof of particular nuisances— eaves dropping, common scold.] Eaves droppers, or such as listen under walls or windows, or the eaves of houses, to hear discourses, and thereupon frame slanderous and mischievous tales, are common nuisances, and indictable, and may be punished by fine, and finding sureties for their good behaviour. 4 *Bl. Com.* 167. *Burn's Justice, Eaves Droppers.* 1 *Russell*, 302.

So a common scold is indictable as a common nuisance, and upon conviction may be fined or imprisoned, or put into the ducking-stool. *Hawk. P. C. b.* 1. 75. *s.* 14. 4 *Bl. Com.* 168. The particulars need not be set forth in the indictment. *Hawk.*

P. C. b. 2. *c.* 25. *s.* 59; nor is it necessary to prove the particular expressions used, it is sufficient to give in evidence generally, that the defendant is always scolding. *Per Buller J. J'Anson v. Stuart*, 1 *T. R.* 754.

Proof of the liability of the defendant.] A man may be guilty of a nuisance by the act of his agent or servant. Thus it has been ruled that the directors of a gas company are liable for an act done by their superintendant and engineer, under a general authority to manage their works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. *Medley's case*, 6 *C. & P.* 292.

OATHS—UNLAWFUL.

Statutes 666
Proof of the oath 667
Proof of aiding and assisting . . . 668
Proof for prisoner 668
Disclosure of facts . . . 668
Venue 669

Statutes.] The offence of taking or administering unlawful oaths is provided against by statutes 37 G. 3. c. 123, and 52 G. 3. c. 104.

By the former of these statutes (sec. 1.) it is enacted, that any person or persons who shall in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at, and consenting to the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same, to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose; or to obey the order or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for

that purpose; or not to inform or give evidence against any associated confederate or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done, or to be done; or not to reveal or discover any illegal oath or engagement, which may have been administered or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall on conviction be adjudged guilty of felony, and be transported for any term not exceeding seven years, and every person who shall *take* such oath or engagement, not being compelled thereto, is subject to the same punishment. *See Mark's case*, 3 *East*, 157.

By statute 52 G. 3. c. 104. s. 1, it is enacted, that every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason, or murder, or any felony punishable by law with death, shall on conviction be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy, and every person who shall *take* any such oath or engagement, not being compelled thereto, shall on conviction be adjudged guilty of felony, and be transported for life, or for such term of years as the court shall adjudge.

The statutes are not confined to oaths administered with a seditious or mutinous intent, *Ball's case*, 6 *C. & P.* 563. *Brodribb's case*, *Id.* 571. And it is sufficient to aver that the oath was administered, not to give evidence against a person belonging to an association of persons associated to do "a certain illegal act." *Brodribb's case*, *ubi sup.*

Proof of the oath.] With regard to what is to be considered an oath within these statutes, it is enacted by the 37 G. 3. c. 123. s. 5, that any engagement or obligation whatsoever in the nature of an oath, and by 52 G. 3. c. 104. s. 6, that any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same, to commit any treason, or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those statutes, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person or persons, to any other person or persons, or taken by any person or persons, without any administration thereof by any other person or persons.

It is not necessary in the indictment to set forth the words of the oath or engagement, the purport or some material part thereof is sufficient. 37 *G.* 3. c. 123. *s.* 4. 52 *G.* 3. c. 104. *s.* 5. *Moors's case*, 6 *East*, 419. (*n.*) Parol evidence may be given

of the oath, though the party administering it appeared to read it from a paper, to produce which no notice has been given. *Moors's case, ubi sup. ante, p.* 10. And where the terms of the oath are ambiguous, evidence of the declarations of the party administering it, made at the time, is admissible, to show the meaning of those terms. *Id.*

If the book on which the oath was administered was not the Testament, it is immaterial, if the party taking the oath believes himself to be under a binding engagement. *Brodripp's case,* 6 *C. & P.* 571. *Loveless's case,* 1 *Moo. & Rob.* 349.

Where the prisoners were indicted under the 37 G. 3. Williams B. said, that with regard to the oath contemplated by the act of parliament, it was not required to be of a formal nature, but that it was sufficient if it was intended to operate as an oath, and was so understood by the party taking it. The precise form of the oath was not material, and the act provided against any evasions of its intentions by declaring, (sec. 5,) that any engagement or obligation whatever in the nature of an oath should be deemed an oath within the intent and meaning of the act, in whatever form or manner the same should be administered or taken. *Loveless's case,* 1 *Moo. & Rob.* 349.

Proof of aiding and assisting.] Who shall be deemed persons aiding and assisting in the administration of unlawful oaths is declared by the third section of the 37 G. 3. c. 123, which enacts that persons aiding or assisting in, or present and consenting to the administering or taking of any oath or engagement before mentioned in that act, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such, although the person or persons who actually administered such oath or engagement, if any such there be, shall not have been tried or convicted. The statute 52 G. 3. c. 104, contains a similar provision. (sec. 3.)

Proof for prisoner—disclosure of facts.] In order to escape the penalties of these statutes, it is not sufficient for the prisoner merely to prove that he took the oath or engagement by compulsion, but in order to establish that defence, he must show that he has complied with the requisitions of the statutes, by the earlier of which (sec. 2,) it is enacted, that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she knows touching the same, and the person or persons to whom and in whose presence, and when and

where such oath or engagement was administered or taken, by information on oath before one of his majesty's justices of the peace, or one of his majesty's principal secretaries of state, or his majesty's privy council, or in case the person taking such oath or engagement, shall be in actual service in his majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer. The 52 G. 3. c. 104, contains a similar provision, (sec. 2,) fourteen days being substituted for four days.

Venue.] Offences under these statutes committed on the high seas, or out of the realm, or in England, shall be tried before any court of oyer and terminer or gaol delivery for any county in England in the same manner and form, as if the offence had been therein committed.

OFFICES—OFFENCES RELATING TO.

Proof of malfeasance—illegal acts in general . . 669
Proof of nonfeasance 670
Proof of extortion 671
Proof on prosecutions for refusing to execute an office . 671

Under this head will be considered the evidence requisite in prosecutions against officers,—1, for malfeazance; 2, for nonfeasance; 3, for extortion; and, 4, for refusing to execute an office.

Proof of malfeasance—illegal acts in general.] It is a general rule that a public officer is indictable for misbehaviour in his office. *Anon.* 6 *Mod.* 96. And where the act done is clearly illegal, it is not necessary in order to support an indictment, to show that it was done with corrupt motives. Thus, where a licence having been refused by certain magistrates, another set of magistrates, having concurrent jurisdiction, appointed a subsequent day for a meeting, and granted the licence which had been refused before, it was held that this was an illegal act, and punishable by indictment, without the addition of corrupt

motives. *Sainsbury's case*, 4 *T. R.* 451. Still more is such an offence punishable when it proceeds from malicious or corrupt motives. *Williams's case*, 3 *Burr.* 1317. *Hollands's case*, 1 *T. R.* 692.

A gaoler is punishable for barbarously misusing his prisoners. *Hawk. P. C. b.* 1, *c.* 66, *s.* 2. So overseers of the poor for misusing paupers, as by lodging them in unwholesome apartments, *Wetheril's case*, *Cald.* 432 ; or by exacting labor from such as are unfit to work, *Winship's case*, *Cald.* 76.

Public officers are also indictable for frauds committed by them in the course of their employment. As where an overseer receives from the father of a bastard a sum of money as a compensation with the parish, and neglects to give credit for this sum in account, he is punishable, though the contract is illegal. *Martin's case*, 2 *Campb.* 268. *See also Bembridges's case, cited* 6 *East*, 136.

Proof of nonfeasance.] Upon a prosecution for not performing the duties of an office, the prosecutor must prove, 1, that the defendant holds the office ; 2, that it was his duty, and within his power to perform the particular act, and 3, that he neglected so to do.

Where an officer is bound by virtue of his office, to perform an act, the neglect to perform that act is an inditable offence. Thus a coroner, 2 *Chitt. C. L.* 255, 1 *Russell*, 141 ; a constable, *Wyat's case*, 380 ; a sheriff, *Antrobus's case*, 6 *C. & P.* 784 ; and an overseer of the poor, *Tawney's case*, 1 *Bott*, 333, are indictable for not performing their several duties. The majority of the judges were of opinion, that an overseer cannot be indicted for not relieving a pauper, unless there has been an order of justices for such relief, or unless in a case of immediate and urgent necessity. *Meredith's case*, *Russ. & Ry.* 46. But where the indictment stated that the defendant (an overseer) had under his care a poor woman belonging to his township, but neglected to provide for her necessary meat, &c. whereby she was reduced to a state of extreme weakness and afterwards, through want, &c. died, the defendant was convicted, and sentenced to a year's imprisonment. *Booth's case*, *Ibid*, 47. (*n.*) And in a case where an overseer was indicted for neglecting, when required, to supply medical assistance to a pauper labouring under dangerous illness, it was held that the offence was sufficiently charged and proved, though the pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. *Warren's case*, *coram Holroyd*, *Ibid*, *p.* 48 (*n.*)

By statute 11 G. 1. c. 4, the chief officers of corporations, absenting themselves on the charter day for the election of officers, shall be imprisoned for six months. Such offence, however, is not indictable within the statute unless their presence is

necessary to constitute a legal corporate assembly. *Corry's case*, 5 *East*, 372.

Proof of extortion.] One of the most serious offences committed by persons in office is that of extortion, which is defined to be the taking of money by an officer by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. *Hawk. P. C. b.* 1, *c.* 68. *s.* 1. So the refusal by a public officer to perform the duties of his office until his fees have been paid, is extortion. 3 *Inst.* 149. *Hescott's case*, 1 *Salk.* 330. *Hutt.* 53. So when the farmer of a market erected such a number of stalls that the market people had not space to sell their wares, it was held that the taking money from them for the use of the stalls, was extortion. *Burdett's case*, 1 *Ld. Raym.* 149. The offence of extortion is punishable as a misdemeanor at common law, by fine and imprisonment, and by removal from office. *Hawk. P. C. b.* 1, *c.* 68. *s.* 5. Penalties are likewise added by the statute of Westm. 1. c. 26.

The prosecutor must be prepared to prove, first that the defendant fills the office in question. For this purpose, it will be sufficient to show, that he has *acted* as such officer; and secondly, the fact of the extortion. This must be done by showing what are the usual fees of the office, and proving the extortion of more. The indictment must state the sum which the defendant received, but the exact sum need not be proved, as where he is indicted for extorting twenty shillings, it is sufficient to prove that he extorted one shilling. *Burdett's case*, 1 *Ld. Raym.* 149. *Gillham's case*, 6 *T. R.* 267.

Proof on prosecutions for refusing to execute an office.] A refusal to execute an office to which a party is duly chosen, is an indictable offence, as that of constable; *Lone's case*, 2 *Str.* 920. *George's case*, *Cowp.* 13 ; or overseer. *Jones's case*, 2 *Str.* 1145. 7 *Mod.* 410.

The prosecutor must prove the election or appointment of the defendant, his liability to serve, notice to him of his appointment, and his refusal. It must appear that the persons appointing him had power so to do. Thus on an indictment for not serving the office of constable on the appointment of a corporation, it must be stated and proved that the corporation had power by prescription to make such an appointment, for they possess no such power of common right. *Bernard's case*, 2 *Salk.* 52. 1 *Ld. Raym.* 94. The notice of his appointment must then be proved, *Harpur's case*, 5 *Mod.* 96, and his refusal, or neglect to perform the duties of the office, from which a refusal may be presumed.

PERJURY.

At common law 672
Proof of the authority to administer an oath . . 672
Proof of the occasion of administering the oath . . 674
Proof of the taking of the oath 675
Proof of the substance of the oath . . . 676
Proof of the materiality of the matter sworn . . 680
Proof of introductory averments . . . 683
Proof of the falsity of the matter sworn . . 685
Proof of the corrupt intention of the defendant . . 685
Witnesses, number required 686
Competency of 688
Statutes relating to perjury 689
Subornation of perjury 691
Proof of incitement 691
Proof of taking the false oath 691

The proofs required to support an indictment for perjury at common law will be first considered, and the statutes creating the offence of perjury in various cases will be subsequently stated.

Perjury at common law.] Perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. *Hawk. P. C. b.* 1. *c.* 69, *s.* 1. The proceedings, however, are not confined to courts of justice. *Vide post, p.* 674.

To support an indictment for perjury, the prosecutor must prove, 1, the authority to administer an oath; 2, the occasion of administering it; 3, the taking of the oath; 4, the substance of the oath; 5, the materiality of the matter sworn; 6, the introductory averments; 7, the falsity of the matter sworn; and, 8, the corrupt intention of the defendant. 2 *Stark. Ev.* 621, 2*d ed.*

Proof of the authority to administer an oath.] Where the oath has been administered by a master in chancery, surrogate or

commissioner, having a general authority for that purpose, it is not necessary to prove his appointment; it being sufficient to show that he has acted in that character. *See the cases cited, ante, p.* 7, *and p.* 14. But as this evidence is only presumptive, it may be rebutted, and the defendant may show that there was no appointment, or that it was illegal. Thus after proof that the oath had been made before a person who acted as a surrogate, the defendant showed that he had not been appointed according to the canon, and was acquitted. *Verelst's case*, 3 *Campb.* 432. Where the party administering the oath derives his authority from a special commission, directed to him for that purpose, it is necessary to prove the authority, by the production and proof of the commission which creates the special authority. 2 *Stark. Ev.* 622, 2*d ed.* Thus upon an indictment for perjury against a bankrupt, in passing his last examination, Lord Ellenborough ruled that it was necessary to give strict proof of the bankruptcy, which went to the authority of the commissioners to administer an oath, for unless the defendant really was a bankrupt, the examination was unauthorised. *Punshon's case*, 3 *Campb.* 96. 3 *B. & C.* 354.

Where a cause was referred by a judge's order, and it was directed that the witnesses should be sworn before a judge, "or before a commissioner *duly authorised*," and a witness was sworn before a commissioner for taking affidavits (empowered by stat. 29 Car. 2. c. 5.), it was held that he was not indictable for perjury, the commissioner not being "duly authorised" by the statute to administer an oath for a *vivâ voce* examination. *Hanks's case*, 3 *C. & P.* 419. So on an indictment for perjury, before a justice, in swearing that J. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the county in which the justice acted, Eyre, J. arrested the judgment, because, as the charge did not so import, the justice had no power to administer the oath to the defendant. *Wood's case*, 2 *Russell*, 540.

In the case of a trial taking place where the court has no jurisdiction, as where one of several co-plaintiffs dies, and his death is not suggested on the roll, pursuant to 8 & 9 W. 3. c. 11. s. 6, the suit is abated, and for evidence given at the trial a witness cannot be indicted for perjury. *Cohen's case*, 1 *Stark. N. P. C.* 511. So a false oath taken in the court of requests, in a matter concerning lands, has on the same ground been held not to be indictable. *Baston v. Gouch*, 3 *Salk.* 269. But a false oath taken before commissioners, whose commission is at the time in strictness determined by the death of the king, is perjury, if taken before the commissioners had notice of the demise. *Hawk. P. C. b.* 1. *c.* 69. *s.* 4. 2 *Russell*, 521.

No oath taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority; or before those who are authorised to administer some oaths, but not that which

happens to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth void, can ever amount to perjury in the eye of the law, for they are of no manner of force. *Hawk. P. C. b.* 1. *c.* 69. *s.* 4. 2 *Russell*, 521.

The authority by which the party is empowered to administer the oath, must, if specially described, be proved as laid. Therefore where the indictment stated the oath to have been administered at the assizes, before justices *assigned to take the said assizes*, before A. B. one of the said justices, the said justices having then and there power, &c., and in fact the judge, when the oath was administered, was sitting under the commission of *oyer* and *terminer* and gaol delivery, this was held to be a fatal variance. *Lincoln's case, Russ. & Ry.* 421. But an indictment for perjury at the assizes may allege the oath to have been taken before *one* of the judges in the commission, though the names of both appear. *Alford's case*, 1 *Leach*, 150.

Proof of the occasion of administering the oath.] The occasion of administering the oath must be proved as stated. Thus, if the perjury were committed on the trial of a cause at Nisi Prius, the record must be produced in order to show that such a trial was had; 2 *Stark. Ev.* 622, 2*d ed.*, and for this purpose the Nisi Prius record is sufficient. *Iles' case, Cases temp. Hardw.* 118, *ante*, *p.* 156. The occasion, and the parties before whom it came on to be tried, must be correctly stated, and a variance will be fatal, as where it was averred that a cause came on to be tried before Lloyd, Lord Kenyon, &c., *William Jones* being associated, &c., and it appearing that *Roger Kenyon* was associated, it was ruled to be a fatal variance. *Eden's case*, 1 *Esp.* 97.

With regard to the occasion upon which the oath is administered, it is not merely before courts of justice, even at common law, that persons taking false oaths are punishable for perjury. Any false oath is punishable as perjury, which tends to mislead a court in any of its proceedings relating to a matter judicially before it, though it in no way affects the principal judgment which is to be given in the cause; as an oath made by a person offering himself as bail. And not only such oaths as are taken on judicial proceedings, but also such as any way tend to abuse the administration of justice are properly perjuries, as an oath before a justice to compel another to find sureties of the peace; before commissioners appointed by the King to inquire into the forfeiture of his tenants' estates, or commissioners appointed by the King to inquire into defective titles. *Hawk. P. C. b.* 1. *c.* 69, *s.* 3. A false oath in any court, whether of record or not, is indictable for perjury. 5 *Mod.* 348. And perjury may be assigned upon the oath against simony, taken by clergymen at the time of their institution. *Lewis's case*, 1 *Str.* 70.

A man may be indicted for perjury in an oath taken by him

in his own cause, as in an answer in Chancery, or to interrogatories concerning a contempt, or in an affidavit, &c. as well as by an oath taken by him as a witness in the cause of another person. *Hawk. P. C. b.* 1. *c.* 69. *s.* 5.

Perjury cannot be assigned upon a false verdict, for jurors are not sworn to depose the truth, but only to judge truly of the depositions of others. *Id.*

Where the prisoner was indicted for taking a false oath before a surrogate to procure a marriage licence, being convicted, the judges, on a case reserved, were of opinion that perjury could not be charged upon an oath taken before a surrogate. They were also of opinion that as the indictment in this case did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted. *Foster's case, Russ. & Ry.* 459, *and see Alexander's case,* 1 *Leach,* 63; *see also* 1 *Vent.* 370, *and Deacon's Observations,* 2 *Dig. C. L.* 1001.

The object with which the oath was taken need not be carried into effect, for the perjury is complete at the moment when the oath is taken, whatever be the subsequent proceedings. Thus where the defendant was indicted for perjury in an affidavit which could not, from certain defects in the *jurat*, be received in the court for which it was sworn, Littledale J. was of opinion that nevertheless perjury might be assigned upon it. *Hailey's case, Ry. & Moo. N. P. C.* 94. So it was ruled by Lord Tenterden that a party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction. *White's case, Moody & Malkin,* 271.

Proof of the taking of the oath.] It is sufficient in the indictment to state that the defendant *duly* took the oath. *M'Arther's case, Peake, N. P. C.* 155. But where it was averred that he was *sworn on the Gospels*, and it appeared that he had been sworn according to the custom of his own country, without kissing the book, it was held a fatal variance, though the averment was afterwards proved by its appearing that he was previously sworn in the ordinary manner. *Id.*

The mode of proving that the defendant was sworn, in an indictment for perjury in an answer in chancery, is by producing the original answer signed by him, and proving his handwriting, and that of the Master in Chancery to the *jurat*, together with proof of the identity of the defendant. *Morris's case,* 1 *Leach,* 50, 2 *Burr.* 1189. *Benson's case,* 2 *Campb.* 508. The making of an affidavit is proved in the same manner by production and proof of the hand-writing. *Ante, p.* 157.

Where the affidavit upon which the perjury was assigned, was signed only with the mark of the defendant, and the *jurat* did

not state that the affidavit was read over to the party, Littledale J. said, As the defendant is illiterate, it must be shown that she understood the affidavit. Where the affidavit is made by a person who can write, the supposition is that such person is acquainted with its contents, but in the case of a marksman it is not so. If in such a case a master by the *jurat* authenticates the fact of its having been read over, we give him credit, but if not, he ought to be called upon to prove it. I should have difficulty in allowing the parol evidence of any other person. *Hailey's case*, 1 *C. & P.* 258.

It is incumbent upon the prosecutor to give precise and positive proof that the defendant was the person who took the oath, *Brady's case*, 1 *Leach*, 330, but this rule must not be taken to exclude circumstantial evidence. *Price's case*, 6 *East*, 323. 2 *Stark. Ev.* 624, 2*d. ed.*

It must appear that the oath was taken in the county where the venue is laid; and the recital in the *jurat* of the place where the oath is administered, is sufficient evidence that it was administered at the place named. *Spencer's case*, *Ry. & Moo. N. P. C.* 98. But though the *jurat* state the oath to be taken in one county, the prosecutor may show that it was in fact taken in another. *Emden's case*, 9 *East*, 437. A variance as to the place of taking in the same county, will not be material; thus, if it be alleged to be taken at Serjeant's Inn, in London, and it appear to have been taken in Cheapside, this is not material. *Taylor's case*, *Skinner*, 403.

The making of a false affirmation by a Quaker or Moravian, must be proved in the same manner as the taking of a false oath. By stat. 22 G. 2. c. 46. s. 36, if any Quaker making the declaration or affirmation therein mentioned, shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed and declared any matter or thing which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the pains, penalties, &c., inflicted on persons convicted of wilful and corrupt perjury. The 9 G. 4. c. 32, & 3 & 4. W. 4. c. 49, which admit the evidence of Quakers and Moravians in all cases whatsoever, criminal or civil, contain similar clauses.

Proof of the substance of the oath.] In proving the substance of the oath, or the matter sworn to by the defendant, it was long a question how far it was incumbent on the prosecutor to prove the whole of the defendant's statement relative to the same subject matter, as where he has been both examined and cross-examined; or whether it was sufficient for him merely to prove so much of the substance of the oath as was set out on the record, leaving it to the defendant to prove any other part of the evidence given by him, which qualified or explained the part set

out. Thus Lord Kenyon ruled, that the whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part, it would not be perjury. *Jones' case, Peake, N. P. C.* 38. *See also R. v. Dowlin, Id.* 170. 2 *Chitty, C. L.* 312, 2*d ed. Anon. cor. Lord Gifford, cited Ry. & Moo. N. P. C.* 300, *vide post*, 680.

It was formerly thought that an oath did not amount to perjury unless sworn in absolute and direct terms, and that if a man swore according as he *thought, remembered*, or *believed* only, he could not be convicted of perjury. 3 *Inst.* 166. But the modern doctrine is otherwise. It is said by Lord Mansfield to be certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he knows to be false. *Pedley's case*, 1 *Leach*, 327. De Grey, C. J. also, in *Miller's case*, 3 *Wils.* 427, 2 *Bl.* 881, observed, that it was a mistake mankind had fallen into, that a person cannot be convicted of perjury who swears that he *thinks* or *believes* a fact to be true, for that he certainly may, and it only renders the proof of it more difficult. The same question was agitated in the Common Pleas, when Lord Loughborough and the other judges were of opinion that *belief* was to be considered as an absolute term, and that an indictment might be supported on it. *Anon. Hawk. P. C. b.* 1. *c.* 69. *s.* 7, (*n.*)

So perjury may be committed by swearing to a statement which in one sense is true, but which, in the sense intended to be impressed by the party swearing, is false, as in a case mentioned by Lord Mansfield. The witness swore that he left the party whose health was in question, in such a way that were he to go on as he then was, he would not live two hours. It afterwards turned out that the man was very well, but had got a bottle of gin to his mouth, and true it was, in a sense of equivocation, that had he continued to pour the liquor down, he would in much less time than two hours have been a dead man. *Loft's Gilb. Ev.* 662.

No case appears to have occurred in our law of an indictment for perjury for mere matter of *opinion*. The following observations on this subject, are from the pages of an eminent writer on the criminal law of Scotland. If the matter sworn to, be one of opinion only, as a medical opinion, it cannot in the general case be made the foundation of a prosecution for perjury. But though a medical or scientific opinion cannot in general be challenged as perjury, because the uncertainty and division of opinion in the medical profession is proverbial; yet, if it assert a fact, or draw an inference evidently false, as for example, if a medical attendant swear that a person is unfit to travel who is in perfect health, or an architect shall declare a tenement to be ruined, which is in good condition, certainly the gross falsehood of such an assertion shall in neither case be protected by the

plea that it is related to a matter of professional investigation. *Alison, Princ. Cr. Law of Scotl.* 468.

A doubt may arise, whether a witness can be convicted of perjury, in an answer to a question which he could not legally be called upon to answer, but which is material to the point in issue. No decision upon this subject appears to have taken place in our courts; but in Scotland it has been held, that a conviction for perjury in such case cannot be maintained. Speaking of the general rule, that where the matter is pertinent to the issue, the party taking a false oath will be guilty of perjury, Mr. Alison says, There is one exception, however, to this rule, where the matter on which the perjury was alleged to have been committed was such, as it was not competent to examine the witness upon, however material to the issue; for law cannot lend the terrors of its punishment to protect a party in pursuing an incompetent and illegal train of investigation. On this ground it was, that the decision went, in the case of Patrick M'Curly, 4th of August, 1777, who had been precognosced with a view to a criminal trial, and, afterwards, as often happens, had given a different account of the matter on the trial itself. Towards the close of his deposition, he was asked whether he had ever given a different account of the matter, and he swore he had not. Upon this last falsehood he was indicted for perjury; and after a debate on the relevancy, the prosecutor abandoned the charge; nor, in truth, does it seem possible to maintain an indictment for perjury in such a case, where the question put was clearly incompetent, and the witness would have been entitled to decline answering it. *Prin. Crim. Law Scot.* 470.

Where on an indictment for perjury, upon the trial of an action, it appeared that the evidence given on that trial by the defendant contained all the matter charged as perjury, but other statements not varying the sense, intervened between the matters set out, Abbott, C. J. held the omission immaterial, since the effect of what was stated was not varied. *Soloman's case, Ry. & Moo. N. P. C.* 252. So where perjury was assigned upon several parts of an affidavit, it was held that those parts might be set out in the indictment as if continuous, although they were in fact separated by the introduction of other matter. *Callanan's case,* 6 *B. & C.* 102.

It seems that where the indictment sets forth the *substance* and *effect* of the matters sworn, it must be proved, that in substance and effect, the defendant swore the whole of what is thus set forth as his evidence, although the count contains several distinct assignments of perjury. *Leefe's case,* 2 *Campb.* 134. 4 *B. & C.* 852.

Where the indictment charged that the defendant in substance and effect swore, &c. and it appeared that the deposition was made by him and his wife jointly, he following up

the statement of the wife, this was held to be no variance. *Grendall's case*, 2 *C. & P.* 563.

An indictment for perjury alleged to have been committed in an affidavit sworn before a commissioner of the Court of Chancery, stated that a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt. It then stated, that the defendant preferred his petition to the Lord Chancellor, setting forth various matters, and amongst others, the issuing of the commission, that the petitioner was declared a bankrupt, and that his estate was seized under the commission, and that, at the second meeting, one A. B. was appointed assignee, and an assignment made to him, and that he possessed himself of the estate and effects of the petitioner. It then stated, that at the several meetings before the *commission*, the petitioner declared openly, and in the presence and hearing of the said assignee, to a certain effect. At the trial the petition was produced, and it appeared that the allegation was, that at the several meetings before the *commissioners*, the petitioner declared to that effect. It was held, that this was no variance, inasmuch as it was sufficient to set out in the indictment the petition in substance and effect, and the word "commission," was one of equivocal meaning, and used to denote either a trust or authority exercised, or the *persons* by whom the trust or authority was exercised, and that it sufficiently appeared, from the context of the petition set forth in the indictment, that it was used in the latter sense. *Dudman's case*, 4 *B. & C.* 850.

Where the indictment professes to set out the substance and effect of the matter sworn to, and in the deposition a word is omitted, which is supplied in the setting forth of the deposition in the indictment, this is a fatal variance; the proper mode in such cases is, to set forth the deposition, as it really is, and to supply the sense by an innuendo. *Taylor's case*, 1 *Campb.* 404. And where the indictment, in setting out the *substance* and *effect* of the bill in equity upon the answer to which the perjury was assigned, stated an agreement between the prosecutor and the defendant respecting *houses*, and upon the original bill being read, it appeared that the word was *house* (in the singular number,) Abbott, C. J. said, The indictment professes to describe the substance and effect of this bill; it does not, certainly, profess to set out the tenor, but this I think is a difference in substance and consequently a fatal variance. *Spencer's case*, *Ry. & Moo. N. P. C.* 98.

The omission of a letter, in setting out the affidavit on which perjury is assigned, will not be material, if the sense is not altered thereby, as *undertood* for *understood*. Although it be under an averment, "to the tenor and effect *following*." *Beech's case*, 1 *Leach*, 133. *Coup.* 229.

In a late case where the witness stated, that he could not undertake to say that he had given the whole of the prisoner's

testimony, but to the best of his recollection he had given all that was material to the inquiry, and relating to the transaction in question; Littledale J. thought that this evidence was *primâ facie* sufficient, and that if there was any thing else material sworn by the prisoner on the former trial, he might prove it on his part. No such evidence having been given, the prisoner was convicted, and on a case reserved, the judges held that the proof was sufficient for the jury, and that the conviction was right. *Rowley's case, Ry. & Moo. N. P. C.* 299, 1 *Moody, C. C.* 111. Where it has once been proved, says Mr. Starkie, that particular facts positively and deliberately sworn to by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony, he explained or qualified that which he had sworn to. 2 *Stark. Ev.* 625, 2*d ed.*

The defendant, although perjury be assigned in his answer, deposition, or affidavit in writing, may prove that an explanation was afterwards given, qualifying or limiting the first answer. 2 *Stark. Ev.* 627. 2*d ed.* 2 *Russell*, 549. *Carr's case, Sid.* 418. And if it appear, on the evidence for the prosecution, that a part of the defendant's statement, qualifying the rest, is omitted, the judge will not suffer the case to go to the jury. The defendant had paid a bill for a Mr. Shipley, and summoned a party named Watson, to whom he had paid it, before the Court of Requests for an overcharge. The defendant was asked whether Watson was indebted to him in the sum of 11s. he answered, "he is." On the question being repeated, and the witness required to recollect himself, he subjoined, "as agent for Mr. Shipley." He was indicted for perjury upon his first answer only, but it appearing upon the case for the prosecution, that he had qualified that answer, Nares, J. refused to permit the case to go to the jury, observing that it was perjury, assigned on part only of an oath, the most material part being purposely kept back. *Hurry's case*, 1 *Lofft's Gilb. Ev.* 57.

Proof of the materiality of the matter sworn.] It must either appear on the face of the facts set forth in the indictment, that the matter sworn to, and upon which the perjury is assigned, was material, or there must be an express averment to that effect. *Dowlin's case*, 5 *T. R.* 318. *Nicholl's case*, 1 *B. & Ad.* 21. *M'Keron's case*, 2 *Russell*, 541. Thus where upon an indictment for perjury committed in an answer in Chancery, the perjury was assigned in the defendant's denial, in the answer, of his having agreed, upon forming an insurance company, of which he was a director, &c. to advance 10,000*l.* for three years, to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, nor what was prayed; the judgment was

arrested. *Bignold's case*, 2 *Russell*, 541. So perjury cannot be assigned on an answer in Chancery, denying a promise absolutely void by the statute of frauds. *Benesech's case*, *Peake's Add. Cases*, 93.

The materiality of the matter sworn to, must depend upon the state of the cause, and the nature of the question in issue. If the oath is altogether foreign from the purpose, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury. As if upon a trial in which the issue is, whether such a one is *compos* or not, a witness introduces his evidence by giving an account of a journey which he took to see the party, and swears falsely in relation to some of the circumstances of the journey. So where a witness was asked by a judge, whether he brought a certain number of sheep from one town to another altogether, and answered, that he did so, whereas in truth he did not bring them altogether, but part at one time and part at another, yet he was not guilty of perjury, because the substance of the question was, whether he brought them all or not, and the manner of bringing was only circumstance. (2 *Rolle*, 41, 369.) Upon the same ground it is said to have been adjudged, that where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties, answered, it was, when in truth it was only paid for one of them by agreement, such witness ought not to be punished for perjury, because, as the case was, it was no ways material whether it was for one or for both, (2 *Rolle* 42.) Also it is said to have been resolved, that a witness who swore that one drew his dagger, and beat and wounded J. S., when in truth, he beat him with a staff, was not guilty of perjury, because the beating only was material. (*Hetley*, 97.) *Hawk. P. C. b.* 1. *c.* 69. *s.* 8.

After stating these authorities, Mr. Serjeant Hawkins observes, that perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him, through inadvertency, to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly as to the circumstances, and he give a particular and distinct account of all the circumstances, which afterwards appears to be false, he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. Upon these grounds, the opinion of the judges seems to be very reasonable, (1 *Rolle*, 368,

Palmer, 382,) who held a witness to be guilty of perjury who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw 30 or 40 sheep in the close, and that he knew them to be the defendant's, because they were marked with a mark which he knew to be the defendant's, whereas in truth, the defendant never used such a mark; for the giving of such a special reason for his remembrance, could not but make his testimony more credible than it would have been without it; and though it signified nothing to the merits of the cause, whether the sheep had any mark or not, yet inasmuch as the assigning such a circumstance, in a thing immaterial, had such a direct tendency to corroborate the evidence concerning what was most material, it was consequently equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue. *Hawk. P. C. b.* 1. *c.* 69. *s.* 8. 2 *Russell*, 521.

The *degree* of materiality is not, as it seems, to be measured. Thus it need not appear that the evidence was sufficient for the party to recover upon, for evidence may be very material, and yet not full enough to prove directly the issue in question. *Rhodes's case*, 2 *Ld. Raym.* 887. So if the evidence was circumstantially material, it is sufficient. *Griepe's case*, 1 *Lord Raym.* 258. 12 *Mod.* 142.

A few cases may be mentioned to illustrate the question of *materiality*. If in an answer to a bill filed by A. for redemption of lands assigned to him by B., the defendant swears that he had *no notice of the assignment*, and insists upon tacking another bond debt due from B. to his mortgage, this is a material fact on which perjury may be assigned. *Pepys's case*, *Peake*, *N. P. C.* 138. In an answer to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds, (the agreement not being in writing,) and had also denied having entered into any such agreement, and upon this denial in his answer, he was indicted for perjury; but Abbott, C. J. held that the denial of an agreement, which by the statute was not binding upon the parties, was wholly immaterial, and the defendant was acquitted. *Dunston's case*, *Ry. & Moo. N. P. C.* 109, *but see Bartlett v. Pickersgill*, 4 *Burr.* 2255, 4 *East*, 577. (*n.*) An indictment for perjury stated that it became a material question, whether *on the occasion of a certain alleged arrest* L. touched K., &c. The defendant's evidence as set out was, "L. put his arms round him and embraced him" innuendo, that L. had *on the occasion to which the said evidence applied* touched the person of K. It was held by the Court of King's Bench, that the materiality of this evidence did not sufficiently appear. *Nicholl's case*, 1 *B. & Ad.* 21.

In order to show the materiality of the deposition or evidence

of the defendant, it is essential, where the perjury assigned is in an answer to a bill in equity, to produce and prove the bill, or if the perjury assigned is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the Court in answer to which the affidavit in question has been made. If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. 2 *Stark. Ev.* 626, 2*d ed.*

Proof of introductory averments.] Where, in order to show the materiality of the matter sworn to, introductory averments have been inserted in the indictment, those averments must, as in other cases, be proved with great accuracy. 2 *Russell*, 537. Where the averment is a descriptive one a variance will be fatal. In an indictment for perjury before a select committee of the house of commons, it was averred that an election was had for the borough of New Malton, by virtue of a certain precept of the high sheriff of the county, by him duly issued to the bailiff of the said borough of N. M. The precept was directed "to the bailiff of the borough of *Malton*," and it was objected that this was a variance, but Lord Ellenborough held it not to be matter of description, and that if the precept actually issued to the bailiff of the borough of New Malton, it was sufficient. But the indictment having stated that "A. B. and C. D. were returned to serve as burgesses for the borough of New Malton," this was held to be descriptive of the indenture of return, and the borough being therein styled the borough of "Malton," the variance was held fatal. *Leefe's case*, 2 *Camph.* 140. So where upon the trial of an indictment containing an assignment of perjury in the following form, "whereas in truth and in fact the the said defendant at the time of effecting the said policy, that is to say, a certain policy purporting to have been written by one Kite by his agent, Meyer, on the 13th August, 1807, &c. (and by other underwriters specified in the indictment) well knew, &c.," and on production of the policy it appeared to have been underwritten by Meyer for Kite on the 15th, Lord Ellenborough was of opinion, that as the prosecutor had chosen to allege a fact, material with reference to the knowledge of the defendant, it was necessary to prove it, and held the variance fatal. *Huck's case*, 1 *Stark. N. P. C.* 523.

But where the introductory averment is not matter of description, it is sufficient to prove the substance of it, and a variance in other respects will be immaterial. Thus where the indictment averred the perjury to have been committed in the defendant's answer to a bill of discovery in the Exchequer, alleged to have been filed on a day specified, and it appeared that the bill was filed of a preceding term, Lord Ellenborough ruled that the

variance was not material; since the day was not alleged as part of the record, and that it was sufficient to prove the bill filed on any other day. *Huck's case*, 1 *Stark. N. P. C.* 521. And where perjury was assigned on an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the Court, it was held to be no variance, the amended bill being part of the original bill. *Waller's case*, 2 *Stark. Ev.* 623. So in a similar indictment where it was averred, that *Francis Cavendish* Aberdeen, and others, exhibited their bill in the Exchequer, and the bill on the face of it purported to be exhibited by *J. C.* Aberdeen, and others, Lord Ellenborough held the variance immaterial, but that if the indictment had professed to set out the tenor of the bill, it would have been a variance. *Roper's case*, 1 *Stark. N. P. C.* 518. And upon a motion in arrest of judgment, the Court of King's Bench held the conviction right. *Per Abbott, J.* It is no more than addressing a man by a wrong name, which may well happen without causing any uncertainty as to the identity of the person intended to be addressed. 6 *M. & S.* 327. And, again in a similar case, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) *and another*, and in fact it was filed against B., C., and D., but the perjury was assigned on a part of the answer which was material between A. and B., Lord Ellenborough held the variance immaterial. *Benson's case*, 2 *Campb.* 509. The defendant was tried on an indictment for perjury, committed in giving evidence, as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "whereby his life was greatly despaired of." In the indictment for perjury, the indictment for the assault was introduced in these words, "which indictment was presented in manner and form following, that is to say," and set forth the indictment for the assault at length, and correctly, with the omission of the word "despaired" in the above passage. It was insisted that this was a fatal variance, but the learned judge who tried the case said, that the word *tenor* had so strict and technical a meaning as to make a literal recital necessary, but that by the words "in manner and form following, that is to say," nothing more was requisite than a substantial recital, and that the variance in the present case was only matter of form, and did not vitiate the indictment. *May's case*, 2 *Russell*, 539. Where the indictment stated that *an issue* came on to be tried, and it appeared that an information containing several counts, upon each of which issue was joined, came on to be tried, the variance was held immaterial. *Jones's case, Peake, N. P. C.* 37.

The defendant was indicted for perjury on an answer to a bill in Chancery, which had been amended after the answer put in. To prove the amendments, a witness was called, who stated

that the amendments were made by a clerk in the Six Clerks' Office, whose hand-writing he knew, and that the clerk wrote the word "amendment" against each alteration. Lord Tenterden was of opinion, that this was sufficient proof of the amendments, but did not think it material to the case. *Laycock's case*, 4 *C. & P.* 326.

Upon an indictment for perjury committed on a trial at the London sittings, the indictment alleged the trial to have taken place before Sir J. Littledale, one of the justices, &c. On producing the record, it did not appear before whom the trial took place, but the *postea* stated it to have been before Sir C. Abbott, C. J., &c. In point of fact, it took place before Mr. Justice Littledale. Lord Tenterden overruled the objection, that this was a variance, saying—on a trial at the assizes, the *postea* states the trial to have taken place before both justices; it is considered in law as before both, though in fact it is before one only; and I am not aware that the *postea* is ever made up here differently, when a judge of the court sits for the chief justice. *Coppard's case*, *Moody & Malk.* 118.

Proof of the falsity of the matter sworn.] Evidence must be given to prove the falsity of the matter sworn to by the defendant; but it is not necessary to prove that all the matters assigned are false; for, if one distinct assignment of perjury be proved, the defendant ought to be found guilty. *Rhodes's case*, 2 *Lord Raym.* 886. 2 *W. Bl.* 790. 2 *Stark. Ev.* 627. 2*d ed.* And where the defendant's oath is as to his belief only, the averment that he "well knew to the contrary" must be proved. *See* 2 *Chitty, C. L.* 312. 2 *Russell*, 542.

Where the prosecutor gave no evidence upon one of several assignments of perjury, Denman, C. J. refused to allow the defendant to show that the matter was not false. *Hemp's case*, 5 *C. & P.* 468.

Proof of the corrupt intention of the defendant.] Evidence is essential, not only to show that the witness swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge. 2 *Stark. Ev.* 627, 2*d ed.* In this, as in other cases of intent, the jury may infer the motive from the circumstances. *Knill's case*, 5 *B. & A.* 929, (*n.*)

There must be proof that the false oath was taken with some degree of deliberation; for if, under all the circumstances of the case, it appears that it was owing to the weakness rather than the perverseness of the party, as where it is occasioned by surprise or inadvertence, or by a mistake with regard to the true state of the question, this would not amount to voluntary and corrupt perjury. *Hawk. P. C. b.* 1. *c.* 69. *s.* 2. 2 *Russell*, 518. 4 *Bl. Com.* 137.

Witnesses—number requisite.] It is a general rule, that the testimony of a single witness is insufficient to convict on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict, in a case where there would be merely the oath of one man to be weighed against that of another. 2 *Stark. Ev.* 626, 2*d ed.* 2 *Russell*, 544. *Hawk. P. C. b.* 1. *c.* 69. 4 *Bl. Com.* 358. But it is said that this rule must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by the defendant; for, if any other material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *Lee's case*, 2 *Russell*, 545. So it is said, by Mr. Phillipps, that it does not appear to have been laid down that two witnesses are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite; that at least one witness is not sufficient; and in addition to his testimony, some other independent evidence ought to be produced. 1 *Phill. Ev.* 141. 6*th ed.*

A distinction, however, appears to be taken between proving the positive allegations in the indictment, and disproving the truth of the matter sworn to by the defendant; the latter, as it is said, requiring the testimony of two witnesses. Thus Mr. Serjeant Hawkins says, that it seems to be agreed that two witnesses are required in proof of the crime of perjury; but the *taking of the oath* and the *facts deposed* may be proved by one witness only. *Hawk. P. C. b.* 2. *c.* 46. *s.* 10. So it is said by Mr. Starkie, (citing the above passage from Hawkins) that it seems the *contradiction* must be given by *two direct witnesses;* and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient. He adds that he had been informed that it had been so held by Lord Tenterden. 2 *Stark. Ev.* 626, (*n.*)

But where a statement by the prisoner himself is given in evidence, contradicting the matter sworn to by him, it has been held not to be necessary to call two witnesses to prove the falsity; one witness, with proof of the admission, being sufficient. The defendant made information, upon oath before a justice of the peace, that three women were concerned in a riot at his mill, (which was dismantled by a mob, on account of the price of corn); and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and having been tampered with in their favour, he then swore that they were not at the riot. There was no other evidence on the trial for perjury to prove that the women were in the riot, (which was the perjury assigned), but the defendant's information, which was read. The judge thought this evidence sufficient, and the defendant was convicted and transported. *Anon. cor. Yates*,

and afterwards Lord Mansfield, and Wilmot and Aston, J J. concurred, 5 *B. & A.* 939, 940, (*n.*) 2 *Russell,* 545. So in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas, in that case, only one witness had been adduced to prove the *corpus delicti, viz.* the witness who deposed to the contradictory evidence given by the defendant, before the committee of the House of Commons; and further it was insisted, that the mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances showing a corrupt motive, and negativing the probability of any mistake. But the Court held, that the evidence was sufficient, the contradiction being by the party himself; and that the jury might infer the motive from the circumstance, and the rule was refused. *Knill's case,* 5 *B. & A.* 929, *note* (*a.*) So where, upon an indictment for perjury, in an affidavit made by the defendant, a solicitor, to oppose a motion in the Court of Chancery, to refer his bill of costs for taxation, only one witness was called, and, in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor; upon which it was objected that this was not sufficient, the bill not having been delivered on oath, Denman, C. J. was clearly of opinion, that the bill delivered by the defendant was sufficient evidence, or that even a letter written, by the defendant contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness. *Mayhew's case,* 6 *C. & P.* 315.

There appears, however, to be an objection to this evidence which is not easily removed, namely, that there is nothing to show which of the statements made by the defendant is the false one, where no other evidence of the falsity is given. Upon this subject the following observations were made by Holroyd, J.: Although you may believe that, on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict, where it is not possible to tell which is the true and which is the false. *Jackson's case, Lewin, C. C.* 270.

The following observations on this subject, by an able writer

on criminal law, are well deserving of attention. Where depositions, contrary to each other, have been emitted in the same matter by the same person, it may with certainty be concluded that one or the other is false. But it is not relevant to infer perjury in so loose a manner; the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable that the perjury should be specified as existing in one, and the other deposition referred to *in modum probationis*, to make out along with other circumstances, where the truth really lay. *Alison, Princ. Cr. Law of Scot.* 475. These remarks are applicable to the cases in our law, in which the evidence of one witness, *viz.* the party producing the contradictory statement, and the statement itself, have been allowed as sufficient evidence to prove the falsity of the oath. Such statements may be used as strong corroborations of the prosecutor's case, and as such they are admitted in the Scotch law. A party cannot be convicted (says Mr. Alison) of perjury, upon the evidence merely of previous or subsequent declarations emitted by him, inconsistent with what he has sworn; because *in dubio* it must be presumed that what was said under the sanction of an oath was the truth, and the other an error or falsehood, but both such declarations and written evidence under his hand, inconsistent with what he has sworn, form important articles, which, with others, will be sufficient to make the scales of evidence preponderate against him. *Principles of Crim. Law of Scot.* 481.

Witnesses—competency of.] It was formerly ruled, that the party injured by the perjury was incompetent as a witness for the prosecution, where he might obtain relief in equity, on the ground of the perjury. *Dalby's case, Peake, N. P. C.* 12. *Eden's case,* 1 *Esp. N. P. C.* 97. But as it is now an established rule, that a court of equity will not grant relief on a conviction which proceeds on the evidence of the prosecutor, there can be no objection to his being admitted as a witness. *Bartlett v. Pickersgill, cited* 4 *Burr.* 2255, 4 *East,* 577. 1 *Phill. Ev.* 112, 6*th ed.* And, in general, the party prejudiced is a competent witness to prove the offence. *Broughton's case,* 2 *Str.* 1230. *Abraham v. Bunn,* 4 *Burr.* 2255, 2 *Russell,* 546. It is no objection to the competency of a witness, on an indictment for perjury committed in an answer in chancery, that in

his answer to a cross bill, filed by the defendant, he has sworn the fact which he is to prove on the indictment. *Pepys's case, Peake, N. P. C.* 138.

If several persons are separately indicted for perjury, in swearing to the same fact, any of them, before conviction, may give evidence for the other defendants. 2 *Hale, P. C.* 280.

Statutes relating to perjury.] The principal statutory enactment respecting perjury is the 29 Eliz. c. 5. the operation of which is, however, more confined than that of the common law; and as it does not (see sec. 13,) restrain in any manner the punishment of perjury at common law, it has seldom been the practice to proceed against offenders by indictment under this statute.

By sec. 1, the procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam*, is punishable by the forfeiture of forty pounds.

By sec. 4, offenders, not having goods, &c. to the value of forty pounds, are to suffer imprisonment, and stand in the pillory.

Sec. 5, enacts, that no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record, (within England, Wales, or the marches of the same,) until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed, to be first given against them or any of them by action or actions, to be sued upon his or their case or cases, according to the course of the common laws of the realm.

Sec. 6, enacts, that if any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall, for his or their said offence, lose and forfeit twenty pounds, and to have imprisonment by the space of six months, without bail or mainprize; and the oath of such person or persons so offending, from thenceforth not to be received in any court of record within this realm of England or Wales, or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; and that, upon every such reversal, the parties grieved to recover his or their

damages against all and every such person and persons as did procure the said judgment so reversed to be given against them, or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.

By sec. 7, if such offenders have not goods to the value of twenty pounds, they are to be set in the pillory, and have their ears nailed, and to be disabled from being witnesses until judgment reversed.

This provision, as already stated, does not affect persons convicted of perjury at common law, whose competency may be restored by pardon, though it is otherwise with regard to persons convicted under this statute. *Ante*, *p.* 103.

It appears that a person cannot be guilty of perjury, within the meaning of this statute, in any case wherein he may not be guilty of subornation of perjury within the same statute; and as the subornation of perjury, there mentioned, extends only to subornation "in matters depending in suit by writ, action, bill, plaint, or information, in anywise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c.," no perjury, upon an indictment or criminal information, can bring a man within the statute. *Hawk. P. C. b.* 1. *c.* 69. *s.* 19. *Bac. Ab. Perjury*, (*B.*) The statute only extends to perjury by witnesses, and therefore no one comes within the statute by reason of a false oath in an answer to a bill in chancery, or by swearing the peace against another, or in a presentment made by him as homager of a court baron, or for taking a false oath before commissioners appointed by the king. *Hawk. P. C. b.* 1. *c.* 69. *s.* 20. It seems that a false oath taken before the sheriff, on an inquiry of damages, is within the statute. *Id. s.* 22. No false oath is within the statute, which does not give some person a just cause of complaint; for otherwise it cannot be said that any person was grieved, hindered, or molested. In every prosecution on the statute, therefore, it is necessary to set forth the record of the cause wherein the perjury complained of is supposed to have been committed, and also to prove at the trial of the cause, that there is actually such a record, by producing it, or a true copy of it, which must agree with that set forth in the pleadings, without any material variance, otherwise it cannot legally appear that there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed. If the action was by more than one, the false oath must appear to have been prejudicial to all the plaintiffs. *Hawk. P. C. b.* 1. *c.* 69. *s.* 23. *Bac. Ab. Perjury*, (*B.*) 2 *Russell*, 534.

Various provisions for facilitating the punishment of persons guilty of perjury, are contained in the stat. 23 G. 2. c. 11. By section 3, the judges of assize, &c. may direct any witness to be prosecuted for perjury, and may assign counsel, &c. By sections 1 and 2, the indictment in perjury is much

simplified, it being made sufficient to set forth the *substance* of the offence charged upon the defendant; and by what court, or before whom the oath was taken, (averring such court or person to have a competent authority to administer the same,) together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, &c. or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed; and so also with regard to indictments for subornation of perjury.

The statutes, imposing the punishment of perjury upon the taking of false oaths in particular matters, are extremely numerous. An abstract of the principal of these will be found in 2 *Russell*, 526, *et seq.*, *and in* 2 *Deacon*, *Dig. C. L.* 1010.

SUBORNATION OF PERJURY.

Subornation of perjury, at common law, is the procuring a man to take a false oath, amounting to perjury, the man actually taking such oath; but if he do not actually take it, the person, by whom he was incited, is not guilty of subornation of perjury; yet he may be punished by fine and corporal punishment. *Hawk. P. C. b.* 1. *c.* 69. *s.* 10.

Upon an indictment for subornation of perjury, the prosecutor must prove, 1, the inciting by the defendant, and that he knew that the evidence to be given was false; and 2, the taking of the false oath by the witness, &c.

Proof of the incitement.] The incitement may be proved by calling the party who was suborned, and though convicted, he is a competent witness if he has been pardoned. *Reilly's case*, 1 *Leach*, 454. The knowledge of the defendant that the evidence about to be given would be false, will probably appear from the evidence of the incitement, or it may be collected from other circumstances.

Proof of the taking of the false oath.] In general the proof of the perjury will be the same as upon an indictment for perjury, against the witness who perjured himself; and even if the latter has been convicted, it will not, as it seems, be sufficient, against the party who has suborned him, to prove merely the record of the conviction; but the whole evidence must be gone into as upon the former trial. The defendant was indicted for procuring one John Macdaniel to take a false oath. To prove the taking of the oath by Macdaniel, the record of his conviction for perjury was produced. But it was insisted for the defendant, that the record was not of itself sufficient evidence of the

fact; that the jury had a right to be satisfied that such conviction was correct; that the defendant had a right to controvert the guilt of Macdaniel, and that the evidence given on the trial of the latter ought to be submitted to the consideration of the present jury. The Recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. *Reilly's case*, 1 *Leach*, 455. Upon this case Mr. Starkie has made the following observations: — This authority seems at first sight to be inconsistent with that class of cases in which it has been held that, as against an accessory before the fact to a felony, the record of the conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal in procuring, &c., had been indicted as accessory before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected, that this doctrine rests rather upon technical and artificial grounds, than on any clear and satisfactory principle of evidence. 2 *Stark. Ev.* 627, 2*d ed.* It may also be observed, that the indictment for subornation of perjury does not set forth the *conviction* of the party who took the false oath, but only the preliminary circumstances and the taking of the oath; forming an allegation of the *guilt* of the party, and not of his *conviction*; and in *Turner's case*, 1 *Moody, C. C.* 347, *post*, the judges expressed a doubt whether, if an indictment against a receiver stated, not the *conviction*, but the *guilt* of the principal felon, the record of the conviction of the principal would be sufficient evidence of the guilt.

PIRACY.

Offence at common law . . . 692
Stat. 11 & 12 *W.* 3. *c.* 7. . . . 693
8 *G.* 1. *c.* 24. . . . 693
18 *G.* 2. *c.* 30. . . . 694
32 *G.* 2. *c.* 25. . . . 694
5 *G.* 4. *c.* 113, *dealing in slaves* . . 694
Proof of the piracy . . . 695
Proof with regard to the persons guilty . . 695
Proof with regard to accessories . . . 696
Venue and trial . . . 696

Offence at common law.] The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would

have amounted to felony there; though it was no felony at common law. 2 *East, P. C.* 796. 4 *Bl. Com.* 72 *Hawk. P. C. c.* 37. *s.* 4. Before the statute 28 Hen. 8. c. 15, the offence was only punishable by the civil law, and that statute does not render it a felony. By other statutes, however, which will be presently noticed, the offence is made felony, and the nature of the offence which shall constitute piracy is specifically described.

Statute 11 *&* 12 *W.* 3. *c.* 7.] By statute 11 & 12 W. 3. c. 7. s. 8, it is enacted, that if any of his Majesty's natural born subjects or denizens of this kingdom, shall commit any piracy, or robbery, or any act of hostility against others, his Majesty's subjects upon the sea, under colour of any commission from any foreign prince, or state, or pretence of authority from any person whatsoever, such offender or offenders shall be deemed adjudged, and taken to be pirates, felons, and robbers.

By section 9, if any commander, or master of any ship, or any seaman or mariner, shall in any place where the admiral has jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his, or their ship, or ships, or any barge, boat, ordnance, ammunition, goods, or merchandize, or yield them up voluntarily to any pirate; or shall bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt, or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or run away with any ship, goods, or merchandize, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust, or shall confine his master, or make, or endeavour to make a revolt in his ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and suffer death, &c.

Upon the above section (9) of the 11 & 12 W. 3. c. 7, it has been decided by the twelve judges, that the making, or endeavouring to make a revolt on board a ship, with a view to procure a redress of what the prisoners may think grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within the statute. *Hasting's case*, 1 *Moody, C. C.* 82.

Stat. 8 *G.* 1. *c.* 24.] By statute 8 G. 1. c. 24. s. 1, it is enacted, that in case any person or persons belonging to any ship, or vessel whatsoever, upon meeting any merchant ship, or vessel on the high seas, or in any port, haven or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard, or destroy any part of the goods or merchandize belonging

to such ship or vessel, the person or persons guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid.

And by the same section, if any commander or master of any ship or vessel, or any other person or persons shall anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with any pirate, felon, or robber upon the seas; or if any person or persons shall anyways consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of such piracy, felony, or robbery, every such offender shall be deemed and adjudged guilty of piracy, felony, and robbery.

Statute 18 *G.* 2. *c.* 30.] By statute 18 G. 2. c. 30, it is enacted, that all persons being natural born subjects or denizens of his Majesty, who, during any war, shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects, by virtue or under colour of any commission from any of his Majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his Majesty's enemies upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, &c., may be tried as pirates, felons, and robbers in the Court of Admiralty, in the same manner as pirates, &c., are by the said act (11 & 12 W. 3.) directed to be tried, and shall suffer death.

Under this statute, it has been held, that persons *adhering to the King's enemies* by cruising in their ships, may be tried as *pirates* under the usual commission granted by virtue of the statute 28 Hen. 8. *Evans's case*, 2 *East*, *P. C.* 798.

Stat. 32 *Geo.* 2. *c.* 25.] By stat. 32 Geo. 2. c. 25, s. 12, in case any commander of a private ship or vessel of war, duly commissioned by the 29 G. 2. *c.* 34, or by that act, shall agree with any commander or other person belonging to any neutral or other ship or vessel (except those of his Majesty's declared enemies) for the ransom of any such neutral or other ship or vessel, or cargo, after the same has been taken as a prize, and shall, in pursuance of such agreement, quit, set at liberty, or discharge any such prize, instead of bringing it into some port of his Majesty's dominions, such offender shall be deemed and adjudged guilty of piracy, felony, and robbery, and shall suffer death. *See stat.* 22 *Geo.* 3. *c.* 25, *and* 2 *East*, *P. C.* 801.

Stat. 5 *Geo.* 4. *c.* 113—*dealing in slaves.*] By statute 5 Geo. 4. c. 113, s. 9, the carrying away, conveying, or removing, of any person upon the high seas for the purpose of his being im-

ported or brought into any place as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose, is made piracy, felony, and robbery, punishable with death. By section 10 the dealing in slaves, and other offences connected therewith, are made felony.

Proof of the piracy.] The prosecutor must give evidence of facts, which, had the transaction occurred within the body of a county, would have rendered the offender guilty of larceny or robbery at common law. He must therefore show a taking *animo furandi* and *lucri causâ*. It is said that if a ship is attacked by a pirate, and the master, for her redemption, gives his oath to pay a sum certain, though there is no taking, yet it is piracy by the law marine, but by the common law there must be an actual taking, though but to the value of a penny, as in robbery. 1 *Beawes, Lex Merc.* 25, *citing* 44 *Ed.* 3. 14, 4 *Hen.* 4. If a ship is riding at anchor, with part of the mariners in her boat, and the rest on shore, so that none remain in the ship, if she be attacked and robbed, it is piracy. 1 *Beawes, Lex Merc.* 253, *citing* 14 *Edw.* 3. 115.

Proof with regard to the persons guilty of piracy.] The subject of a foreign power in amity with this country may be punished for piracy committed upon English property. 1 *Beawes, Lex Merc.* 251. A person having a special trust of goods will not be guilty of piracy by converting them to his own use; as where the master of a vessel, with goods on board, ran the goods on shore in England, and burnt the ship with intent to defraud the owners and insurers, on an indictment for piracy and stealing the goods, it was held to be only a breach of trust, and no felony, and that it could not be piracy to convert the goods in a fraudulent manner, until the special trust was determined. *Mason's case*, 2 *East, P. C.* 796, 8 *Mod.* 74. But it is otherwise with regard to the mariners. Thus where several seamen on board a ship seized the captain, he not agreeing with them, and after putting him ashore, carried away the ship, and subsequently committed several piracies, it was held that this force upon the captain, and carrying away the ship, was piracy. *May's case*, 2 *East, P. C.* 796. The prisoners were convicted upon a count charging them with feloniously and piratically stealing sixty-five fathoms of cable, &c., upon the high seas, within the jurisdiction of the admiralty. It appeared that they were Deal pilots, who having been applied to by the master to take the vessel into Ramsgate, had, in collusion with him, cut away the cable and part of the anchor, which had before been broken, for the purpose of causing an average loss to the underwriters. It was objected that the offence of the prisoners was not larceny, having been committed by them jointly with the master of the vessel, not for the purpose of defrauding the owners,

but for the purpose of defrauding the underwriters for the benefit of the owners. A majority of the judges, however, held the conviction right. *Curling's case, Russ. & Ry.* 123.

Proof with regard to accessories.] Accessories to piracy were triable only by the civil law, and if their offence was committed on land, they were not punishable at all before the stat. 11 & 12 W. 3. c. 7. s. 10. And now by satute 8 Geo. 1. c. 24. s. 3, all persons whatsoever, who, by the stat. 11 & 12 W. 3. c. 7. are declared to be accessory or accessories to any piracy or robbery therein mentioned are declared to be principal pirates, felons, and robbers, and shall be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may, according to that statute, and shall suffer death in like manner as pirates, &c.

The knowingly abetting a pirate, within the body of a county, is not triable at common law. *Admiralty case,* 13 *Rep.* 53.

Venue and trial.] The decisions with respect to the venue upon prosecutions for offences committed on the high seas have been already stated, *ante, p.* 187.

By statute 46 Geo, 3. c. 54. all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm; and for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the King's commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor, &c., shall from time to time think fit to appoint. The commissioners are to have the same powers as commissioners under the statute 28 Hen. 8.

POST OFFICE—OFFENCES RELATING TO.

Embezzlement by officers of . . . 697
Proof that the prisoner was a person employed by the post office 698
Proof of the secreting, embezzlement, or destruction . 699
Proof of the letter or packet intrusted to the prisoner 699
Proof that the letter, &c., contained the whole or some part of a note, &c. . . . 700
Accessories, &c., . . . 701
Embezzling money and destroying letters by persons in the post office 701
Stealing letters by persons not employed in the post office . 702
Secreting letters, &c., found . . . 704
Embezzling newspapers, notes, &c. . . . 704
Forging post office marks . . . 704
Forging franks . . . 705

Embezzlement by officers of post office.] The law with regard to the embezzlement of letters by persons employed in the post office was formerly contained in the statutes 5 Geo. 3. c. 25. s. 17, 7 Geo. 3. c. 50. s. 1, and 42 Geo. 3. c. 81. s. 1. The provisions of those acts are, however, now consolidated in the 52 G. 3. c. 143.

The first section of that statute takes away the penalty of death for breach of the revenue laws, except where imposed by that act itself.

The first section enacts, that if any deputy, clerk, agent, letter carrier, post boy, or rider, or any other officer or person whatsoever, employed by or under the post office of Great Britain, in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the said office, shall secrete, embezzle, or destroy any letter or packet, or bag, or mail of letters, with which he or she shall have been intrusted in consequence of such employment, or which shall in any other manner have come to his or her hands or possession, whilst so employed, containing the whole, or any part or parts of any bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the bank, South Sea, East India, or any other

company, society, or corporation, navy, or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket, or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note whatsoever, for the payment of money: or shall steal and take out of any letter or packet, with which he or she shall have been so entrusted, or which shall have so come to his or her hands or possession, the whole, or any part or parts of any such bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the bank, South Sea, East India, or any other company, society, or corporation, navy, or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment of any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note whatsoever, for the payment of money; every person so offending, being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

Upon a prosecution for secreting, embezzling, or destroying any letter, &c., under this statute, the prosecutor must prove, 1st, that the prisoner was a deputy, &c., or person employed by or under the post-office in receiving, &c.; 2d, that he did secrete, embezzle, or destroy; 3d, a letter, or packet, &c. entrusted to him, in consequence of his employment, or come to his possession while so employed; and 4th, that it contained the whole or some part of some bank-note, &c.

Embezzlement by officers of—proof that the prisoner was a person employed under the post-office.] The employment of the prisoner in some one of the special capacities named in the statute, or generally "by or under the post-office," must be proved. It is not necessary in these cases to produce the actual appointment of the prisoner, it is sufficient to show that he acted in the capacity imputed to him. *Borrett's case*, 6 *C. & P.* 124. *Rees's case*, *Id.* 606. The prisoner was indicted on the 7 G. 3. c. 50, in the first and third counts, as "a person employed in sorting and charging letters in the post-office," and in the second and fourth counts, as "a person employed in the business relating to the general post-office;" it appeared that he was only a sorter and not a charger, and he was convicted on the second and

fourth counts only. It was objected that as he was acquitted on the counts charging him as a sorter and charger, and it was not proved that he was employed in any other capacity than that of sorter, he ought not to have been convicted on the second and fourth counts. The judges thought the objection valid, but were inclined to be of opinion that the prisoner might have been properly convicted upon the first and third counts by a special finding, that he was a sorter only. *Shaw's case*, 2 *East, P. C.* 580, 2 *W. Bl.* 789, 1 *Leach*, 79. In a subsequent case where the prisoner was described as a post-boy and rider, and was proved to be only a post-boy, being convicted, the judges held the conviction right, saying that a post-boy riding on horseback was a rider as well as a post-boy. *Ellins's case*, *Russ. & Ry.* 188. A person employed at a receiving-house of the general post-office to clean boots, &c., and who occasionally assisted in tying up the letter-bags, is not a person employed by the post-office within 52 G. 3. c. 143. s. 2. *Pearson's case*, 4 *C. & P.* 572.

Where the prisoner was employed by a post-mistress to carry letters from D. to B., at a weekly salary paid him by the post-mistress, which was repaid to her by the post-office, it was held that he was a person employed by the post-office within the statute 52 G. 3. c. 143. s. 2. *Salisberry's case*, 5 *C. & P.* 155. In the above case, Patteson, J., was inclined to think that the words "whilst employed," in the second section, merely meant that the party should be then in the employ of the post-office, and not that the letter stolen should be in the party's hands in the course of his duty, *Ibid.*

Embezzlement by officers of—proof of the secreting, embezzlement, or destruction.] The prosecutor must prove that the prisoner either embezzled, secreted, or destroyed the letter or parcel, &c. described. Where the prisoner secreted half a bank-note on one day, and the other half on another day, it was held to be a secreting of the note within the statute 7 G. 3. c. 50. The doubt was, whether *secreting* in the statute did not mean the *original* secreting, as taking does; but the judges distinguished between taking and secreting, for after the prisoner had got possession of the second letter, he secreted both. *Moore's case*, 2 *East, P. C.* 582. The statute 52 G. 3. mentions, "any part of any bill," &c. The secreting will be proved in general by circumstantial evidence. *Vide ante, as to concealment of effects by Bankrupts, p.* 224.

Embezzlement by officers of—proof of the letter or packet intrusted to the prisoner.] It must be proved that there was a letter or packet, &c. intrusted to the prisoner, in consequence of his employment, or which came to his hands in consequence of his employment. In an indictment upon the 7 G. 3. c. 50,

the letter was described as one "to be delivered to persons using in trade the name and firm of *Messrs.* B. N. & H." the word *Messrs.* being frequently added to their address in the direction of letters and other papers received on business, though they themselves in drawing bills, &c. never used the word, this was held to be no variance. *Dawson's case*, 2 *East*, *P. C.* 605.

Embezzlement by officers of—proof that the letter, &c. contained the whole or some part of a note, &c.] It must appear that the letter or packet, &c., contained the whole or some part of a note or other instrument enumerated in the statute. Where the letter embezzled was described as containing several notes, it was held sufficient to prove that it contained any one of them, the allegation not being descriptive of the letter, but of the offence. *Ellins's case*, *Russ. & Ry.* 188. It is not necessary to prove the execution of the instruments which the letter is proved to contain. *Ibid.* Country bank-notes paid in London, and not re-issued, have been held to be within the statute 7 G. 3. They were said to be valuable to the possessors of them, and available against the makers of them, and fell within both the words and meaning of the act. *Ransom's case*, *Russ. & Ry.* 232. 2 *Leach*, 1090. Upon an indictment under the 7 G. 3, it was held that a bill of exchange might be described as a warrant for the payment of money, as in cases of forgery. *Willoughby's case*, 2 *East*, *P. C.* 581. Neither the former statutes nor the 52 G. 3, contain the word "coin" or "money." The prisoner was indicted under the former statutes for stealing 5*s.* 3*d.* in gold coin, (being a sorter in the post-office,) and it was objected that as the letters contained *money*, and not securities for money, the case was not within the acts, and the Court (at the Old Bailey) being of this opinion, the prisoner was acquitted. *Skutt's case*, 2 *East*, *P. C.* 582. The security specified in the statute must be valid and available, and therefore a draft purporting to be drawn in London, but drawn in Maidstone, and having no stamp upon it pursuant to the 31 G. 3. c. 25, was held not to be a draft within the 7 G. 3. c. 50. *Pooley's case*, *Russ. & Ry.* 12. 2 *Leach*, 887, 3 *Bos. & Pul.* 311.

It seems that the contents of the letter secreted, &c. will not be evidence as against the prisoner to prove that the letter contained the valuable security mentioned in it. *Plumer's case*, *Russ. & Ry.* 264. The letter in question had marked upon it, "paid 2*s.*," which was the rate of double postage. This was written by the clerk of the writer of the letter, who had paid the postage, but was not called. There being no other proof of the double postage, the judges held the conviction wrong. *Plumer's case*, *Russ. & Ry.* 264.

Embezzlement by officers of—accessories, &c.] By 52 G. 3. c. 143.

s. 4, it is enacted, that if any person shall counsel, command, hire, persuade, procure, aid, or abet any such deputy, clerk, agent, letter carrier, post-boy, or rider, or any officer or person whatsoever employed by, or under the said office, in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters, or packets, or in any other business relating to the said office, to commit any of the offences hereinbefore mentioned, or shall with a fraudulent intention buy, or receive the whole, or any part or parts of any such security, or instrument, as hereinbefore described, which shall have been contained in, and which at the time of buying or receiving thereof, he or she shall know to have been contained in any such letter or packet so secreted, embezzled, stolen, or taken by any deputy, clerk, agent, letter carrier, post-boy, or rider, or any other officer, or person so employed as aforesaid, or which such person so buying or receiving as aforesaid, shall at the time of buying or receiving thereof, know to have been contained in, and stolen, and taken out of any letter or packet stolen, and taken from, or out of any mail, or bag of letters sent and conveyed by such post, or from or out of any post-office, or house, or place for the receipt or delivery of letters, or packets, or bags, or mails of letters, sent or to be sent by such post, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, and shall and may be tried, convicted, and attainted of such felony, as well before as after the trial or conviction of the principal felon, and whether the said principal felon shall have been apprehended, or shall be amenable to justice or not.

Embezzling money and destroying letters—and by persons employed in the post-office.] By statute 5 G. 3. c. 25. s. 19, it is enacted, that if any deputy, clerk, agent, letter carrier, or other servant, appointed, authorised, and entrusted, to take in letters or packets, and receive the postage thereof, shall embezzle or apply to his, her, or their own use, any money or monies by him, her, or them received with such letters or packets, for the postage thereof, or shall burn, or otherwise destroy any letter or letters, packet or packets, by him, her, or them, so taken in or received, or who by virtue of their respective offices shall advance the rates upon letters or packets sent by the post, and shall not duly account for the money by him, her, or them received for such advanced postage, every such offender or offenders, being thereof convicted as aforesaid, shall be deemed guilty of felony.

By the statute 7 G. 3. c. 50. s. 3, (not expressly repealing the 5 G. 3,) it is enacted, that if any deputy, clerk, agent, letter-carrier, officer, or other person whatsoever, employed or hereafter to be employed in any business relating to the post-office, shall take and receive into his, her, or their hands or pos-

session, any letter or letters, packet or packets to be forwarded by the post, and receive any sum or sums of money therewith for the postage thereof, shall burn or otherwise destroy any letter or letters, packet or packets, by him, her, or them so taken in or received; or if any such deputy, clerk, agent, letter-carrier, officer, or other person whatsoever so employed, or hereafter to be so employed, shall advance the rate or rates of postage upon any letter or letters, packet or packets, sent by the post, and shall secrete, and not duly account for the money by him, her, or them, received for such advanced postage, being thereof convicted as aforesaid, shall be deemed guilty of felony.

The prisoner having been indicted under the foregoing statutes, the jury found specially that he was a person employed by the post-office, in stamping and facing letters, and that he secreted a letter which came into his hands by virtue of his office, containing a 10*l.* note, but that he did not open the same, nor know that the bank note was contained therein, but that he secreted it with intent to defraud the King of the postage, which had been paid. The prisoner, it is said, remained in prison several years, but no judgment appears to have been given. *Sloper's case*, 2 *East*, *P. C.* 583, 1 *Leach*, 81.

Stealing letters by persons not employed in the post-office.] By the 7 G. 3. c. 50. s. 2, it is enacted, that if any person or persons whatsoever shall rob any mail or mails, in which letters are sent or conveyed by the post, of any letter or letters, packet or packets, bag or mail of letters, or shall steal and take from or out of any such mail or mails, or from or out of any bag or bags of letters, sent or conveyed by the post, or from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or letters, packet or packets; although such robbery, stealing, or taking, shall not appear, or be proved to be a taking from the person, or upon the King's highway; or to be a robbery committed in any dwelling-house, or any coach-house, stable, barn, or any outhouse belonging to a dwelling-house; and although it should not appear that any person or persons were put in fear by such robbery, stealing, or taking; yet such offender or offenders, being thereof convicted as aforesaid, shall, nevertheless, respectively be deemed guilty of felony; and shall suffer death as a felon, without benefit of clergy.

This offence may be tried either in the county where it is committed, or where the offender is apprehended. 42 *G.* 3. *c.* 81. *s.* 3.

By 52 G. 3. c. 143. s. 3, it is enacted, that if any person shall steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of Great Britain, or from or out of any post-office, or house, or place for the receipt or delivery of letters or packets, or bags or mails of

letters, sent or to be sent by such post, any letter or packet, or mail of letters sent or to be sent by such post; or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony; and shall suffer death as a felon, without benefit of clergy, and such offences shall and may be inquired of, tried and determined either in the county where the offence shall be committed, or where the party shall or may be apprehended.

Although it has been held, that a person in the employ of the post-office is not within the *second* section of the statute 52 G. 3. c. 143, *ante*, *p.* 698, yet such a person may be indicted and convicted under the *third* section for stealing a letter. *Brown's case*, *Russ. & Ry.* 32, (*n.*) Where the prisoner, with intent to steal the mail bags, pretended to be the guard, and procured them to be let down to him from the window by a string, and carried them away; being indicted on the 7 G. 3, and found guilty, all the judges held the conviction right, on a count for stealing the letters out of the post-office; for his artifice in obtaining the delivery of them in the bag out of the house, was the same as if he had actually taken them out himself. *Pearce's case*, 2 *East*, *P. C.* 603. Upon the same statute, (7 G. 3,) it was held, that a letter carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, could not be indicted for stealing such letters. *Howard's case*, 2 *East*, *P. C.* 604.

The above statute makes it an offence to steal from the *possession* (not from the *person*) of persons employed to convey letters, &c. Therefore, where a mail-rider, after fixing the portmanteau containing the letters on his horse, fastened his horse at the post-office, and went to a house about thirty yards distant for his great coat, and in the meantime the prisoner came and stole the letters, it was held by Wood, B., that the case was within the statute, for that the letters had been in the possession of the mail-rider, and that possession had never been abandoned. *Robinson's case*, 2 *Stark. N. P. C.* 485.

With regard to what is to be considered a "post-office" within the above statute, it has been held, that a "receiving-house" is not such, but such house is "a place for the receipt of letters" within the act; and, if a shop, the whole shop is to be considered as "a place for the receipt of letters," and, therefore, the putting of a letter on the shop counter, or giving it to a person belonging to the shop, is a putting into the post. *Pearson's case*, 4 *C. & P.* 572.

To complete the offence under the above section, of stealing a letter from the place of receipt, the letter should be carried wholly out of the shop, and, therefore, if a person open a letter in the shop, and there steal the contents without taking the letter out of the shop, the case is not within the statute. *Ibid.*

Secreting letters, &c., found.] By 42 G. 3. c. 81. s. 4, reciting that it frequently happened that bags or mails of letters sent by the post, having been stolen, or accidentally lost, and afterwards found, or picked up, were wilfully detained by the persons finding the same, in expectation of gain or reward; it is enacted, that if any person or persons shall wilfully secrete, keep, or detain, or being required to deliver up by any deputy, clerk, agent, letter-carrier, post-boy, rider, driver, or guard of any mail-coach, or any other officer or person whatsoever employed, or to be employed in any business relating to the post-office, shall refuse, or wilfully neglect to deliver up any mail or bag of letters, sent or conveyed or made up in order to be sent or conveyed by the post, or any letter or letters, packet or packets, sent or conveyed by the post, or put for that purpose into any post-office, or house, or place for the receipt or delivery of letters or packets sent, or to be sent by the post, and which letter or letters, packet or packets, bag or mail of letters, shall have been found or picked up by the same or any other person or persons, or shall, by or through accident or mistake have been left with, or at the house of the same, or any other person or persons, each and every person or persons so offending shall be deemed and taken to be guilty of a misdemeanor, to be punished by fine and imprisonment.

Embezzling newspapers, votes of parliament, &c.] By 5 G. 4. c. 20. s. 10, it is enacted, that from and after the passing of this act, if any deputy, clerk, agent, letter-carrier, letter-sorter, post-boy, or rider, or any other officer or person whatsoever employed, or hereafter to be employed in receiving, stamping, sorting, charging, conveying, or delivering letters or packets, or in any other business relating to the post-office in the said United Kingdom, shall wilfully purloin, embezzle, secrete, or destroy, or shall wilfully permit, or suffer any other person or persons to purloin, embezzle, secrete, or destroy any printed votes or proceedings in parliament, or printed newspapers, or any other printed paper whatsoever, sent or to be sent by the post without cover or covers, open at the sides, each and every such person or persons so offending, shall be deemed and taken to be guilty of a misdemeanor, and be punished by fine and imprisonment, and such offences shall and may be inquired of, tried and determined either in the county where the offence shall be committed, or where the party shall or may be apprehended.

Forging post-office marks.] By 54 G. 3. c. 169, s. 14, it is enacted, that if any person shall forge or counterfeit, or cause to be forged or counterfeited, any stamp, mark of postage, or designation upon any letter, thereby authorised to be so stamped, marked, or designated, with intent to avoid the pay-

ment of the rate of postage thereby imposed, each and every person and persons so offending, shall be deemed and taken to be guilty of a misdemeanor, to be punished by fine and imprisonment, and such offence, if committed within Great Britain, shall and may be inquired of, tried, and adjudged, either within the city of London, or where the offence shall be committed.

Forging franks.] The forgery of franks was made felony by the 24 G. 3. Sess. 2. c. 37. s. 9; and by statute 42 G. 3. c. 63. s. 14, it is enacted, that if any person shall forge or counterfeit the hand-writing of any person whatsoever in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, or shall forge, counterfeit, or alter, or procure to be forged, &c., the date upon the superscription of any such letter or packet, or shall write and send by the post, or cause to be written and sent by the post, any letter or packet, the superscription or cover whereof shall be forged or counterfeited, or the date upon such superscription or cover altered in order to avoid the payment of the duty of postage, knowing the same to be forged, counterfeited, or altered; every person so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall be transported for seven years.

PRISON BREACH.

Proof of the nature of the offence for which the person was imprisoned . . . 706
Proof of the imprisonment and the nature of the prison . 706
Proof of the breaking of the prison . . . 707
Conveying tools, &c. to prisoners to assist escape . 707
Special enactments 708

Where a person is in custody on a charge of treason or felony, and effects his escape by force, the offence is a felony at common law; where he is in custody on a minor charge, it is a misdemeanor. *Statute* 1 *Ed.* 2. *st.* 2. 1 *Russell*, 378.

Upon a prosecution for prison breach, the prosecutor must prove, 1, the nature of the offence for which the prisoner was imprisoned; 2, the imprisonment and the nature of the prison; and 3, the breaking of the prison.

Proof of the nature of the offence for which the prisoner was imprisoned.] The statute *de frangentibus prisonam*, 1 Ed. 2. st. 2, enacts "that none thenceforth that breaks prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken or imprisoned did require such a judgment, if he had been convicted thereupon according to the law and custom of the realm." If the offence therefore for which the party is arrested does not require judgment of life or member, it is not a felony. 1 *Russell*, 379. And though the offence for which the party is committed is supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found of an inferior nature, it seems difficult to maintain that the breaking can be a felony. *Ibid.* It seems that the stating the offence in the *mittimus* to be one of lower degree than felony, will not prevent the breaking from being a felony, if in truth the original offence was such. *Hawk. P. C. b.* 2. *c.* 18. *s.* 15. 1 *Russell*, 379. A prisoner on a charge of high treason, breaking prison, is only guilty of a felony. *Hawk. P. C. b.* 2. *c.* 18. *s.* 15. It is immaterial whether the party breaking prison has been tried or not. *Id. s.* 16.

Where the prisoner had been convicted, the certificate of the clerk of assize, &c. with proof of identity, will be proof of the nature and fact of the conviction and of the species and period of confinement to which the party was sentenced. 4 *Geo.* 4. *c.* 64. *s.* 44. *ante, p.* 355.

Although it is immaterial whether or not the prisoner has been convicted of the offence with which he has been charged, yet if he has been tried and acquitted, and afterwards breaks prison, he will not be subject to the punishment of prison breach. And even if the indictment for the breaking of the prison be before the acquittal, and he is afterwards acquitted of the principal felony, he may plead that acquittal in bar of the indictment for felony, for breach of prison. 1 *Hale, P. C.* 611, 612.

Proof of the imprisonment and the nature of the prison.] The imprisonment, in order to render the party guilty of prison breaking, must be a lawful imprisonment; actual imprisonment will not be sufficient; it must be *primâ facie* justifiable. Therefore where a felony has been committed, and the prisoner is apprehended for it, without cause of suspicion, and the *mittimus* is informal, and he breaks prison, this will not be felony, though it would be otherwise if there were such cause of suspicion as would form a justification for his arrest. *Hawk. P. C. b.* 2. *c.* 18. *s.* 7, 15. 1 *Hale, P. C.* 610. So if no felony has in fact been committed, and the party is not indicted, no *mittimus* will make him guilty within the statute, his imprisonment being unjustifiable. *Id.* But if he be taken upon a *capias* awarded on an indictment against him, it is immaterial whether he is guilty or innocent, and whether any crime has or has not

in fact been committed, for the accusation being on record, makes his imprisonment lawful, though the prosecution be groundless. *Hawk. P. C. b.* 2. *c.* 18. *s.* 5, 6.

The statute extends to a prison in law, as well as to a prison in deed. 2 *Inst.* 589. An imprisonment in the stocks, or in the house of him who makes the arrest, or in the house of another is sufficient. 1 *Hale, P. C.* 609. So if a party arrested, violently rescues himself from the hands of the party arresting him. *Ibid.* The imprisonment intended is nothing more than a restraint of liberty. *Hawk. P. C. b.* 2. *c.* 18. *s.* 4.

It is sufficient if the gaoler has a notification of the offence for which the prisoner is committed, and the prisoner of the offence for which he was arrested, and commonly, says Lord Hale, he knows his own guilt, if he is guilty, without much notification. 1 *Hale, P. C.* 610.

Proof of the breaking of the prison.] An actual breaking of the prison with force, and not merely a constructive breaking must be proved. If a gaoler sets open the prison doors, and the prisoner escapes, this is no felony in the latter. 1 *Hale, P. C.* 611. So if another person breaks open the prison. *Id.* And if the prison be fired, and the prisoner escapes to save his life, this excuses the felony, unless the prisoner himself set fire to the prison. *Id.* In these cases the breaking amounts to a misdemeanor only.

A prisoner convicted of felony made his escape over the walls of the prison, in accomplishing which, he threw down some bricks from the top of the wall, which had been placed there loose, without mortar, in the form of pigeon holes, for the purpose of preventing escapes. Being convicted of prison breaking, a doubt arose whether there was such force as to constitute that offence, but the judges were unanimously of opinion that the conviction was right. *Haswell's case, Russ. & Ry.* 458.

Conveying tools, &c. to prisoners to assist in escape.] By statute 4 Geo. 4. c. 64. s. 43, it is enacted, that if any person shall convey or cause to be conveyed into any prison to which that act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall by any means whatever aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being con-

victed thereof, shall be transported beyond the seas for any term not exceeding 14 years.

Special enactments.] The offence of prison breach is made the subject of special provisions in various statutes. Thus, by the 59 Geo. 3. c. 11, prison breaking from the General Penitentiary at Milbank, is made punishable by additional imprisonment for three years, and in case of a second offence, with death.

RAPE.

Statutes respecting 708
Proofs with regard to the person committing the offence . 708
Proofs with regard to the person on whom the offence is committed 709
Proof of the offence 709
Accessories 710
Competency of witnesses 710
Of the unlawful carnal knowledge of female children . 711
Assault with intent to ravish 712

Statutes respecting.] Rape is defined by Lord Hale to be the carnal knowledge of any woman, above the age of ten years, against her will; and of a woman child, under the age of ten years, with or against her will. 1 *Hale, P. C.* 628. 3 *Inst.* 60. *Hawk. P. C. b.* 1. *c.* 41. *s.* 2. The offence has been the subject of various statutory provisions, (Westm. 1. c. 13; Westm. 2. c. 34; 18 Eliz. c. 7. s. 1.). And now, by statute 9 G. 4. c. 31, s. 16, it is enacted, that every person convicted of the crime of rape shall suffer death as a felon.

Proof with regard to the person committing the offence.] An infant under the age of fourteen years is presumed by law unable to commit a rape, but he may be a principal in the second degree, as aiding and assisting, if it appear by the circumstances of the case that he had a mischievous intent. 1 *Hale, P. C.* 630. And although a husband cannot be guilty of a rape upon his own wife, yet he may be guilty as a principal in assisting another person to commit a rape upon her. *Lord Audley's case,* 1 *St. Tr.* 387, *fo. ed.* 1 *Hale, P. C.* 629. The wife in this case is a competent witness against her husband. *Id.*

Proof with regard to the person upon whom the offence is committed.] It must appear that the offence was committed against the will of the woman; but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death or by duress. Nor is it any excuse, that she consented after the fact, or that she was a common strumpet; for she is still under the protection of the law, and may not be forced; or that she was first taken with her own consent, if she was afterwards forced against her will; or that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these circumstances, however, are material, to be left to the jury in favour of the accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence. 1 *East, P. C.* 444. 1 *Hale*, 628, 631. *Hawk. P. C. b.* 1. *c.* 41. *s.* 2.

The opinion, that, where the woman conceived, it could not be rape, because she must have consented, is now completely exploded. 1 *East, P. C.* 445. 1 *Russell*, 557.

Whether carnal knowledge of a woman, who, at the time of the commission of the offence, supposed the man to be her husband, is a rape, came in question in the following case. The prisoner was indicted for a burglary, with intent to commit a rape. It appeared that the prisoner got into the woman's bed, as if he had been her husband, and was in the act of copulation, when she made the discovery; upon which, and before completion, he desisted. The jury found that he had entered the house with intent to pass for her husband, and to have connection with her, but not with the intention of forcing her, if she made the discovery. The prisoner being convicted, upon a case reserved, four of the judges thought that the having carnal knowledge of a woman, whilst she was under the belief of its being her husband, would be a rape; but the other eight judges thought that it would not; several of the eight judges intimated that if the case should occur again, they would advise the jury to find a special verdict. *Jackson's case, Russ. & Ry.* 487.

Proof of the offence.] By the 9 Geo. 4. c. 31. s. 18, reciting that upon trials for the crimes of buggery and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only. In a case which occurred soon after the passing of the 9 G. 4. c. 31, Taunton J. ruled that, notwithstanding the above provision, it was still necessary, in order

to complete the offence, that all which constitutes carnal knowledge should have happened, and that the jury must be satisfied, from the circumstances, that emission took place. *Russell's case*, 1 *Moo. & Rob.* 122. But this decision has been repeatedly overruled: by Hullock B. in *Jennings's case*, 4 *C. & P.* 249; by Park, J., in *Cozins's case*, 6 *C. & P.* 351; and, lastly, upon a case reserved, by all the judges. *Reekspear's case*, 1 *Moody, C. C.* 342, *and Cox's case*, *Id.* 337, 5 *C. & P.* 297.

It has been made a question, upon trials for this offence, how far the circumstance of the hymen not being injured is proof that there has been no penetration: in one case, where it was proved not to have been broken, Ashhurst, J. left it to the jury to say whether penetration was proved; for that if there were any, however small, the rape was complete in law. The prisoner being convicted, the judges held the conviction right. They said that, in such cases, the least degree of penetration was sufficient, though it might not be attended with the deprivation of the marks of virginity. *Russen's case*, 1 *East, P. C.* 438. But in a late case, Gurney B. said, I think that if the hymen is not ruptured, there is not a sufficient penetration to constitute the offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases. *Gammon's case*, 5 *C. & P.* 321. So in *Beck's Medical Jurisprudence, p.* 53, it is said that it would be difficult to support an accusation of rape where the hymen is found entire.

Accessories.] An indictment, charging the prisoner both as principal in the first degree, and as aiding and abetting other men in committing a rape, was held, after conviction, to be valid, upon the count charging the prisoner as principal. Upon such an indictment, it was held that evidence might be given of several rapes on the same woman, at the same time, by the prisoner and other men each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Folkes's case*, 1 *Moody, C. C.* 354.

Competency and credibility of the witnesses.] The party ravished, says Lord Hale, may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offence, and made pursuit after the offender, showed circumstances and signs of the injury, (whereof many are of that nature that women only are the most proper examiners and inspectors;) if the place, in which the fact was done, was remote from people, inhabitants, or passengers; if the offender fled for it; these and the like

are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. 1 *Hale*, 633, 1 *East*, *P. C.* 448. On the other hand, if she concealed the injury for any considerable time, after she had an opportunity to complain; if the place, where the fact was supposed to be committed, was near to inhabitants, or the common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, where it was probable she might have been heard by others: such circumstances carry a strong presumption that her testimony is false. *Ibid.* General evidence of the prosecutrix's bad character is admissible, *ante*, *p.* 72; but not evidence that she had had connexion with a particular person, *Hodgson's case*, *Russ. & Ry.* 211, *ante*, *p.* 72; though the prosecutrix may be asked whether she has not been formerly connected with the prisoner. *Ante*, *p.* 72. A strict caution is given by Lord Hale, with regard to the evidence for the prosecution in cases of rape: "An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 *Hale*, 635.

Of the unlawful carnal knowledge of female children.] The unlawful carnal knowledge of female children, under the age of ten years, was declared to be felony, without benefit of clergy, by the 18 Eliz. c. 7; but that act being repealed by the 9 G. 4. c. 31, it is enacted by the latter statute, (sect. 17,) that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award.

Upon an indictment for carnally knowing a girl under ten years of age, the proofs for the prosecution will be, 1, the commission of the offence; 2, that the child is under ten years of age.

The child herself, however tender her age, if capable of distinguishing between right and wrong, may be examined in proof of the offence. *Tucker's case*, 1 *Phill. Ev.* 19, *ante*, *p.* 94. But her declarations are inadmissible, *Brazier's case*, 1 *East*, *P. C.* 443, *ante*, *p.* 94; though the fact of her having complained of the injury, recently after its having been received, is evidence in corroboration. 1 *Phill. Ev.* 15; *see ante*, *p.* 21. The propriety of corroborating the testimony of the infant, in a case of this kind, has been remarked upon by Mr. Justice Blackstone. 4 *Com.* 214, *ante*, *p.* 94. As to putting off the trial for the purpose of having an infant witness instructed; *vide ante*, *p.* 95.

The age of the child must be proved. Where the offence was committed on the 5th of February, 1832, and the father proved that, on his return home on the 9th of February, 1822, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that she had been baptized on the 9th of February, 1822; this evidence was held insufficient to prove the age. *Wedge's case*, 5 *C. & P.* 298.

Assault with intent to ravish.] Upon an indictment for this offence, the evidence will be the same as in rape, with the exception of the proof of the commission of the offence.

RECEIVING STOLEN GOODS.

Common law and former statutes . . . 712
Statute 7 & 8 Geo. 4. c. 29. 712
Proof of the larceny by the principal . . 714
Proof of the receiving 716
Distinction between receiving and stealing . 716
Joint receiving 718
Proof of the particular goods received . . 719
Proof of guilty knowledge . . . 720
Proof where the prisoner is charged as principal and receiver in different counts . . . 721
Proof by the prisoner of innocence of principal felon 722
Witnesses—competency of principal felon . . 722
Venue 722

Common law and former statutes.] Before the statute 3 & 4 W. & M. c. 9. receivers of stolen goods, unless they likewise received and harboured the thief, were guilty only of a misdemeanor; but by that statute they were made accessories after the fact, and consequently felons. By statute 1 Anne, s. 2. c. 9. it was enacted, that the receiver might be prosecuted for a misdemeanor, though the principal was not before convicted; and by the 5 Anne, c. 31. he might be so prosecuted, though the principal could not be taken. The offence was again changed to felony by 31 Geo. 4. c. 24. s. 3. These acts being now repealed, their provisions are consolidated in the 7 & 8 Geo. 4. c. 29.

Statute 7 & 8 Geo. 4. c. 29.] By the 54th section of that

statute it is enacted, that if any person shall receive any chattel, money, or valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of that act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and every such receiver, howsoever convicted, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and if a male to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit), in addition to such imprisonment; provided always that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

And by section 55, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by that act, such person knowing the same to have been unlawfully stolen, taken, obtained or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit), in addition to such imprisonment.

And by section 60, for the punishment of receivers, where the stealing, &c. is punishable on summary conviction, it is enacted, that where the stealing or taking of any property whatsoever is punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by that act made liable.

To support an indictment upon the 7 & 8 G. 4. c. 29. s. 54, the prosecutor must prove, 1, the stealing of the goods by the principal felon, if it be so stated in the indictment, or his con-

viction for that offence, if it be averred; 2, the receiving of the goods by the prisoner; 3, that the goods so received were those previously stolen; 4, the guilty knowledge of the prisoner.

Proof of the larceny by the principal.] It is not necessary to state, in the indictment, the name of the principal felon. Where it was objected to such a count, that the name of the principal ought to appear, Tindal, C. J, said, The offence created by the act of parliament is not the receiving the stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, is, whether the goods were stolen, and whether the prisoner received them knowing them to have been stolen? *Jervis's case*, 6 *C. & P.* 156. Where the goods had been stolen by some person unknown, it was formerly the practice to insert an averment to that effect in the indictment, and such averment was held good. *Thomas's case*, 2 *East, P. C.* 781. But where the principal was known, the name was stated according to the truth. 2 *East, P. C.* 781. Where the goods were averred to have been stolen by persons unknown, a difficulty sometimes arose as to the proof, the averment being considered not to be proved where it appeared that in fact the principals were known. Thus where, upon such an indictment, it was proposed to prove the case by the evidence of the principal himself, who had been a witness before the grand jury, Le Blanc, J. interposed, and directed an acquittal. He said, he considered the indictment wrong in stating that the property had been stolen by a person unknown; and asked, how the person who was the principal felon could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill? *Walker's case*, 3 *Campb.* 264.

It is difficult to reconcile this decision with the resolution of the judges in the following case. The indictment stated that a certain person or persons, to the jurors unknown, stole the goods, and that the prisoner received the same knowing them to have been feloniously stolen. The grand jury also found a bill, charging one Henry Moreton with stealing the same goods, and the prisoner with receiving them. It was objected that the allegation, that the goods were stolen by a person unknown, was negatived by the other record, and that the prisoner was entitled to an acquittal. The prisoner being convicted, the point was reserved, and the judges held the conviction right, being of opinion that the finding by the grand jury of the bill, imputing the principal felony to Moreton, was no objection to the second indictment, although it stated the principal felony to have been committed by certain persons to the jurors unknown. *Bush's case, Russ. & Ry.* 372.

It has been doubted whether, where the indictment alleges

that the prisoner received the goods in question from a person named, it must be proved that the receipt was in fact from that person. *See marginal note, Messingham's case,* 1 *Moody, C. C.* 257. It seems that as such an averment is immaterial, (*vide ante, p.* 714,) it may be rejected as surplusage, and the proof of it is unnecessary. *Vide* 2 *Deacon, Dig. C. L.* 1092. However, where the indictment stated that the prisoner received the goods from the person who stole them, and that the person who stole them was a person to the jurors unknown, and it appeared that the person who stole the property handed it to J. S., who delivered it to the prisoner, Parke, J. held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and would not allow it to go to the jury to say, whether the person from whom he was proved to have received it, was an innocent agent or not of the thief. *Elsworthy's case, Lewin, C. C.* 117.

Where the indictment states a previous conviction of the principal, such conviction must be proved by the production of an examined copy of the record of the conviction, and it is no objection to such record, that it appears therein that the principal was asked if he was (not *is*) guilty; that it does not state that issue was joined, or how the jurors were returned, and that the only award against the principal is, that he be in mercy, &c. *Baldwin's case, Russ. & Ry.* 241, 3 *Camph.* 265, 2 *Leach,* 928, (*n.*) But if the indictment state not the *conviction* but the *guilt* of the party, it seems doubtful how far the record of conviction would be evidence of that fact. *Turner's case,* 1 *Moody, C. C.* 347, *ante, p.* 40. The opinion of Mr. Justice Foster, however, is in favour of the affirmative. Where the accessory, he says, is brought to trial after the conviction of his principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor does the indictment aver that the principal was in fact guilty. It is sufficient if it recites with proper certainty the record of the conviction. This is evidence against the accessory, to put him on his defence; for it is founded on a legal presumption that every thing in the former proceeding was rightly and properly transacted. *Foster,* 365.

Where the indictment stated that the principal felon had been convicted of the stealing, and in support of this averment, an examined copy of the record was put in, by which it appeared that the principal had pleaded guilty, it was objected that this was merely equivalent to a confession by the principal, and was not evidence against the receiver; but Bosanquet, J. ruled, that though the principal was convicted on his own confession, yet such a conviction was *primâ facie,* but not conclusive evidence, against the accessory. *Blick's case,* 4 *C. & P.* 377.

Where the principal felon has been convicted, it is sufficient in the indictment to state the *conviction,* without stating the

judgment. *Hyman's case*, 2 *Leach*, 925, 2 *East*, *P. C.* 782. *Baldwin's case*, 3 *Campb.* 265.

Proof of the receiving—distinction between receiving and stealing.] It frequently happens that a doubt arises whether the acts done by the person amount to a receiving, or to a stealing, as in the following cases; from which it appears that if the prisoner took part in the transaction, while the act of larceny by others was continuing, he will be guilty as a principal in the larceny, and not as a receiver. Dyer and Disting were indicted for stealing a quantity of barilla, the property of Hawker. The goods, consigned to Hawker, were on board ship at Plymouth. Hawker employed Dyer, who was the master of a large boat, to bring the barilla on shore, and Disting was employed as a labourer, in removing the barilla after it was landed in Hawker's warehouse. The jury found that while the barilla was in Dyer's boat, some of his servants, without his consent, removed part of the barilla, and concealed it in another part of the boat. They also found that Dyer afterwards assisted the other prisoner, and the persons on board who had separated this part from the rest, in removing it from the boat for the purpose of carrying it off. Graham, B., (after consulting Buller J.,) was of opinion, that though, for some purposes, as with respect to those concerned in the actual taking, the offence would be complete, as an asportation in point of law, yet, with respect to Dyer, who joined in the scheme, before the barilla had been actually taken out of the boat where it was deposited, and who assisted in carrying it from thence, it was one continuing transaction, and could not be said to be completed, till the removal of the commodity from such place of deposit, and Dyer having assisted in the act of carrying it off, was, therefore, guilty as principal. *Dyer's case*, 2 *East*, *P. C.* 767. Another case arose out of the same transaction. The rest of the barilla having been lodged in Hawker's warehouse, several persons employed by him as servants conspired to steal a portion of it, and accordingly removed part nearer to the door. Soon afterwards the persons who had so removed it, together with Atwell and O'Donnell, who had in the mean time agreed to purchase part, came and assisted the others (who took it out of the warehouse) in carrying it from thence. Being all indicted as principals in larceny, it was objected that two were only receivers, the larceny being complete before their participation in the transaction; but Graham, B. held, that it was a continuing transaction as to those who joined in the plot before the goods were actually carried away from the premises; and all the defendants having concurred in, or been present at the act of removing the goods from the warehouse where they had been deposited, they were all principals; and the prisoners were convicted accordingly. *Atwell's case*, 2 *East*, *P. C.* 768.

In the following case, the removal of the goods was held to be so complete, that a person concerned in the further removal was held not to be a party to the original larceny. Hill and Smith, in the absence of the prisoner, broke open the prosecutor's warehouse, and took thence the goods in question, putting them in the street, about thirty yards from the warehouse door. They then fetched the prisoner, who was apprised of the robbery, and who assisted in carrying the property to a cart, which was in readiness. The learned judge who tried the case was of opinion, that this was a continuing larceny, and that the prisoner who was present, aiding, and abetting in a continuation of the felony, was a principal in that portion of the felony, and liable to be found guilty; but on a case reserved, the judges were of opinion, that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as the principal, and the conviction as such, was held wrong. *King's case, Russ. & Ry.* 332. The same conclusion was come to in the following case. One Heaton having received the articles in question into his cart, left it standing in the street. In the meantime, the prisoner M'Makin came up, and led away the cart. He then gave it to another man to take it to his (M'Makin's) house, about a quarter of a mile distant. Upon the cart arriving at the house, the prisoner Smith, who was at work in the cellar, having directed a companion to blow out the light, came up and assisted in removing the articles from the cart. For Smith it was argued, that the *asportavit* was complete before he interfered, and *Dyer's case, ante, p.* 716, was cited, and Lawrence, J., after conferring with Le Blanc, J., was of this opinion, and directed an acquittal. *M'Makin's case, Russ. & Ry.* 333, (*n.*) Upon the authority of *King's case*, the following decision proceeded. The prisoner was indicted for stealing two horses. It appeared that he, and one Whinroe went to steal the horses. Whinroe left the prisoner when they got within half a mile of the place where the horses were, stole the horses, and brought them to the place where the prisoner was waiting for him, and he and the prisoner rode away with them. Mr. Justice Bayley at first thought, that the prisoner's joining in riding away with the horses might be considered a new larceny; but on adverting to *King's case*, (*supra*) he thought this opinion wrong, and on a case reserved, the judges were of opinion that the prisoner was an accessory only, and not a principal, because he was not present at the original taking. *Kelly's case, Russ. & Ry.* 421.

The circumstances in the next case were held not to constitute a receiving. The prisoner was indicted for receiving goods stolen in a dwelling-house by one Debenham. Debenham who lodged in the house, broke open a box there and stole the property. The prisoner was seen walking backwards and forwards before the house, and occasionally looking up; and he and Debenham

were seen together at some distance, when he was apprehended, and part of the property found on him. The jury found that Debenham threw the things out of the window, and that the prisoner was in waiting to receive them. Mr. Justice Gaselee thought that under this finding it was doubtful whether the prisoner was guilty of receiving, and reserved the point for the opinion of the judges, who held that the prisoner was a principal, and that the conviction of him as receiver was wrong. *Owen's case*, 1 *Moody, C. C.* 96.

Where the evidence leaves it doubtful in what manner the goods first came to the prisoner's possession, the safest mode is to frame the indictment as for larceny. Stolen property having been discovered concealed in an out-house, the prisoners were detected in the act of carrying it away from thence, and were indicted as receivers. Patteson, J., said, "there is no evidence of any other person having stolen the property. If there had been evidence that some one person had been seen near the house, from which the property was taken, or if there had been strong suspicions that some one person stole it, those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen. If you are of opinion that some other person stole, and that the prisoners received it knowing that fact, they may be convicted of receiving. But I confess, it appears to me rather dangerous, on this evidence to convict them of receiving. It is evidence on which persons are constantly convicted of stealing." The prisoners were acquitted. *Densley's case*, 6 *C. & P.* 399. The two prisoners were indicted for larceny. It appeared that the prisoner A. (being in the service of the prosecutor) was sent by him to deliver some fat to C. He did not deliver all the fat to C., having previously given part of it to the prisoner B. It being objected that B. ought to have been charged as receiver, Gurney, B. said it was a question for the jury whether B. was present at the time of the separation. It was in the master's possession till the time of the separation. *Butteris's case*, 6 *C. & P.* 147.

Proof of receiving, joint receipt.] Where two persons are indicted as joint receivers, it is not sufficient to show that one of them received the property in the absence of the other, and afterwards delivered it to him. This point having been reserved for the opinion of the judges, they unanimously held that upon a joint charge it was necessary to prove a joint receipt; and that as one of the persons was absent when the other received the property, it was a separate receipt by the latter. *Messingham's case*, 1 *Moody C. C.* 257.

Husband and wife were indicted jointly as receivers. The goods were found in their house. Graham, B. told the jury, that generally speaking, the law does not impute to the wife those offences, which she may be supposed to have committed

by the coercion of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavoured to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence. The learned judge resolved that as the charge against the husband and wife was joint, and it had not been left to the jury to say, whether she received the goods in the absence of her husband, the conviction of the wife could not be supported, though she had been more active than her husband. *Archer's case*, 1 *Moody, C. C.* 143.

As the extent of the wife's liability in case of a joint receipt of stolen goods by her and her husband, does not appear to be well settled, it may not be useless to advert to the rule of the Scotch law on this subject. According to that law, the wife may be tried on the same libel with her husband for *reset* (receiving) in which they are both implicated, but she cannot be charged with resetting the goods which he has stolen, and brought to their common house, unless it appear that she was not merely concealing the evidence of his guilt, but commencing a new course of guilt for herself, in which she takes a principal share as by selling the stolen articles, and carrying on long the infamous traffic. If she has done either of these things, her privilege ceases, and in many of such cases the wife has been convicted of receiving goods stolen by the husband. This being matter of evidence, however, must be pleaded to the jury, and cannot be stated as an objection to the relevancy of a charge of reset against the wife. *Alison's Princ. Cr. Law of Scott.* 338.

Proof of the particular goods received.] The proof of the goods received must correspond with the allegation in the indictment, and substantially with the allegation of the goods stolen by the principal felon. But it is sufficient if the thing received be the same in fact, as that which was stolen, though passing under a new denomination, as where the principal was charged with stealing a live sheep, and the accessory with receiving twenty pounds of mutton, *part of the* goods stolen. *Cowell's case*, 2 *East, P. C.* 617. But where the principal felon was charged with stealing six promissory notes of 100*l.* each, and the other prisoner with receiving "the said promissory notes," knowing them to have been stolen, and it appeared that he had only received the proceeds of some of the notes, it was ruled, that the prisoner charged with the receiving must be acquitted. *Walkley's case*, 4 *C. & P.* 132.

Upon an indictment for receiving a lamb, it appeared in evidence that at the time of the receiving, the lamb was *dead*, but on a case reserved, the judges held that it was immaterial as to

the prisoner's offence, whether the lamb was alive or dead, the offence and the punishment for it being in both cases the same. *Puckering's case*, 1 *Moody*, C. C. 242. In another report of this case, the judges are stated to have said, that the word *sheep* (lamb) did not necessarily import, that the animal was received *alive*, though it would have been more correct to state, that the prisoner received the dead body or carcase. *Lewin*, C. C. 302.

Proof of guilty knowledge,] Evidence must be given of the prisoner's guilty knowledge, that he received the goods in question, knowing them to have been stolen. In general this evidence is to be collected from all the various circumstances of the case. The usual evidence is, that the goods were bought at an undervalue by the receiver. Proof that he concealed the goods is presumptive evidence to the same effect. So evidence may be given that the prisoner pledged or otherwise disposed of other articles of stolen property besides those in the indictment, in order to show the guilty knowledge. *Dunn's case*, 1 *Moody*, C. C. 150. And where the receiving of the other articles has been made the subject of another indictment, it is still, as it seems, in strictness, admissible to prove the guilty knowledge. *Davis's case*, 6 C. & P. 177.

[The following enumeration of the circumstances from which a presumption of the prisoner's guilty knowledge may be gathered, well illustrates the subject. "Owing to the jealousy and caution so necessary in this sort of traffic, it often happens, that no express disclosure is made, and yet the illegal acquisition of the articles in question is as well understood, as if the receiver had actually witnessed the depredation. In this, as in other cases, therefore, it is sufficient if circumstances are proved, which to persons of ordinary understanding, and situated as the prisoner was, must have led to the conclusion, that they were illegally acquired.] Thus, if it be proved that the prisoner received watches, jewellery, large quantities of money, bundles of clothes of various kinds, or moveables of any sort, to a considerable value, from boys or other persons destitute of property, and without any lawful means of acquiring them: and especially if it be proved that they were brought at untimely hours, and under circumstances of evident concealment, it is impossible to arrive at any other conclusion, but that they were received in the full understanding of the guilty mode of their acquisition. This will be still further confirmed, if it appear that they were purchased at considerably less than their real value, concealed in places not usually employed for keeping such articles, as under beds, in coal cellars, or up chimnies; if their marks be effaced, or false or inconsistent stories told as to the mode of their acquisition. And it is a still further ingredient towards inferring guilty knowledge, if they have been received

from a notorious thief, or one from whom stolen goods, have on previous occasions, been received. *Alison's Princ. Cr. Law of Scotl.* 330.

Where it was averred that the prisoner, "*Francis* Morris the goods and chattels, &c. feloniously did receive and have; he the said *Thomas* Morris then and there well knowing the said goods and chattels to have been feloniously stolen," &c., it was moved in arrest of judgment, that the indictment was bad, for that the fact of receiving, and the knowledge of the previous felony, must reside in the same person, whereas this indictment charged them in two different persons; but the judges held that the indictment would be good without the words "the said Thomas Morris," which might be struck out as surplusage. *Morris's case*, 1 *Leach*, 109.

The *intention* of the party in receiving the goods is not material, provided he knew them to be stolen. Where it was objected that there was no evidence of a conversion by the receiver, Gurney, B. said, if the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same. *Davis's case*, 6 *C. & P.* 178. The same point was ruled by Taunton, J., in a subsequent case. *Richardson's case*, 6 *C. & P.* 336. The rule by the law of Scotland is the same. If the prisoner once receive the goods into his keeping, it is immaterial upon what footing this is done, whether by purchase, pledge, barter, or as a mere depository for the thief. Nay, though he buy them for full value, the crime is the same, because he knowingly detains them from the true owner; but the fact of a fair price having been paid is an important circumstance to outweigh the presumption of the guilty knowledge. *Alison's Princ. Crim. Law of Scotl.* 329, *Hume*, 113, *Burnett*, 155, 156.

Proof where the prisoner is charged as principal and receiver in different counts.] A person may be legally charged in different counts of the same indictment, both as the principal felon and as the receiver of the same goods. *Galloway's case*, 1 *Moody, C. C.* 234. But the judges on a case reserved were equally divided in opinion whether the prosecutor should in such case be put to his election. They all agreed, however, that directions should be given to the respective clerks of assize not to put both charges in the same indictment. *Id.* The latter point again arose in a subsequent case, and, after discussion, a great majority of the judges were of opinion that the rule laid down in *Galloway's case*, (*supra*,) should be adhered to. *Madden's case*, 1 *Moody, C. C.* 277. Where the prisoner was indicted for stealing, and the second count charged him with a substantive felony in receiving, Vaughan, B. ruled that the prosecutor must elect upon which of the counts he would proceed. *Flower's case*, 3 *C. & P.* 413.

Proof by the prisoner of innocence of principal felon.] The party charged as receiver may controvert the guilt of the principal felon, even after his conviction, and though that conviction is stated in the indictment. For, as against him, the conviction is only presumptive evidence of the principal's guilt, under the rule that it is to be presumed that in the former proceeding every thing was rightly and properly transacted. It being *res inter alios acta*, it cannot be conclusive as to him. *Foster*, 365. If, therefore, it should appear, on the trial of the receiver, that the offence of which the principal was convicted did not amount to felony, (if so charged), or to that species of felony with which he is charged, the receiver ought to be acquitted. *Id.* Thus where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared on the cross-examination of the prosecutor, that, in fact, the party convicted had only been guilty of a breach of trust, the prisoner, on the authority of Foster, was acquitted. *Smith's case*, 1 *Leach*, 288. *Prosser's case*, *Id.* 290 (*n.*)

Witnesses—competency of principal felon.] The principal felon, though not convicted or pardoned, is a competent witness for the crown to prove the whole case against the receiver. *Haslam's case*, 1 *Leach*, 418. *Price's case*, *Patram's case*, *Id.* 419, (*n.*) 2 *East*, P. C. 732. But the *confession* of the principal felon is not, as it has been already stated, evidence against the receiver. *Turner's case*, 1 *Moody*, C. C. 347, *ante*, *p.* 40.

Venue.] By 7 & 8 Geo. 4. c. 29. s. 76, (after providing that nothing contained in the act shall extend to Scotland or Ireland, except as follows), it is enacted, that if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen, or otherwise feloniously taken in any other part of the United Kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence, in that part of the United Kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part.

And by sec. 56, if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in any county or place in which he shall have, or shall have had, any such property in his possession; or in any county or place in which the party guilty of the principal

felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished, in the county or place where he actually received such property.

RESCUE.

Nature of the offence 723
Proof of the custody of the party rescued . . 723
Proof of the rescue 724
Punishment 724
Aiding a prisoner to escape 724
Offence under various statutes . . . 724

Nature of the offence.] The offence of rescue nearly resembles that of prison breach, which has already been treated of, *ante*, *p.* 697. Where the party rescued is imprisoned on a charge of felony, the rescuing is felony also. 1 *Hale*, *P. C.* 606. Where the offence of the former is a misdemeanor, that of the latter will be a misdemeanor also. *Hawk. P. C. b.* 2, *c.* 21. *s.* 6.

If the party rescued was imprisoned for felony, and was rescued before indictment, the indictment for the rescue must surmise a felony done, as well as an imprisonment for felony, or on suspicion of felony, but if the party was indicted and taken upon a *capias* and then rescued, there needs only a recital that he was indicted *prout*, &c., and taken and rescued. 1 *Hale*, *P. C.* 607. Though the party rescuing may be *indicted* before the principal be convicted and attainted, yet he shall not be arraigned or tried, before the principal is attainted. *Id.* In such case, however, he may, as it seems, be indicted and tried for a misdemeanor, though not for a felony. 1 *Hale*, *P. C.* 599.

Proof of the custody of the party rescued.] To make the offence of rescuing a party felony, it must appear that he was in custody for felony or suspicion of felony, but it is immaterial whether he was in the custody of a private person, or of an officer, or under a warrant of a justice of the peace, for where the

arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that the party rescuing should have knowledge that the other is under arrest for felony, if he be in the custody of a private person, though if he be in the custody of a constable or sheriff, or in prison, he is bound to take notice of it. 1 *Hale, P. C.* 606. If the imprisonment be so far irregular that the party imprisoned would not be guilty of prison breach by making his escape, a person rescuing him will not subject himself to the punishment of rescue. *Hawk. P. C. b.* 2. *c.* 21. *s.* 1, 2. 1 *Russell*, 383.

Proof of the rescue.] The word *rescue*, or some word equivalent thereto, must appear in the indictment, and the allegation must be proved by showing that the act was done forcibly, and against the will of the officer who had the party rescued in custody. *Burridge's case*, 3 *P. Wms.* 483. In order to render the offence of rescue complete, the prisoner must actually get out of the prison. *Hawk. P. C. b.* 2. *c.* 18. *s.* 12.

Punishment.] The offence of rescuing a person in custody for felony was formerly punishable as a felony within clergy at common law. *Stanley's case, Russ. & Ry.* 432. But now, by 1 & 2 Geo. 4. c. 88. s. 1, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, head borough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years.

Aiding a prisoner to escape.] Under the head of rescue may be classed the analogous offence of aiding a prisoner to escape. This, as an obstruction of the course of justice, was an offence at common law, being a felony where the prisoner was in custody on a charge of felony, and a misdemeanor in other cases. *See Burridge's case*, 3 *P. Wms.* 439.

Aiding a prisoner to escape—offence under various statutes.] The offence of assisting a prisoner to escape has, by various statutes, been subjected to different degrees of punishment. By statute 4 Geo. 4. c. 64. s. 43, the conveying any disguise or in-

struments into any prison with intent to aid or assist a prisoner to escape is made a felony, punishable by transportation for fourteen years. And the assisting any prisoner in attempting to make his escape from any prison, is subject to the same punishment. Similar provisions are contained in the 16 G. 2. c. 31.

Upon the latter statute it has been held, that the act is confined to cases of prisoners committed for felony, expressed in the warrant of commitment or detainer, and therefore a commitment on suspicion only, is not within the act. *Walker's case*, 1 *Leach*, 97. *Greeniff's case*, 1 *Leach*, 363. It was likewise held on the construction of this statute, that it does not extend to a case where the escape has been actually effected, but only to the attempt. *Tilley's case*, 2 *Leach*, 662. The delivering the instrument is an offence within the act, though the prisoner has been pardoned of the offence of which he was convicted, on condition of transportation; and a party may be convicted, though there is no evidence that he knew of the specific offence of which the prisoner he assisted had been convicted. *Shaw's case*, *Russ. & Ry.* 526.

Where the record of the conviction of the person aided is set forth, and is produced by the proper officer, no evidence is admissible to contradict that record. *Shaw's case*, *Russ. & Ry.* 526.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

Proof of riot—nature of in general . . 725
Proof of the unlawful assembling . . . 726
Proof of the violence or terror 726
Proof of the object of the rioters—private grievance . 727
Proof of the guilt of the defendants . . 727
Proof upon prosecution under the Riot Act . . 728
Proof of demolishing buildings, &c. (7 & 8 G. 4. c. 30.) 730
Proof of a rout 731
Proof of an unlawful assembly . . . 731

Proof of riot—nature of in general.] A riot is defined by Hawkins to be a tumultuous disturbance of the peace, by three

persons or more, assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. *Hawk. P. C. b.* 1. *c.* 65. *s.* 1.

Proof of the unlawful assembling.] An unlawful assembling must be proved, and, therefore, if a number of persons, met together at a fair, suddenly quarrel, it is an affray, and not a riot, *ante, p.* 198 ; but if, being so assembled, on a dispute occurring, they form into parties, with promises of mutual assistance, and then make an affray, it will be a riot ; and, in this manner, any lawful assembly may be converted into a riot : so a person, joining rioters, is equally guilty, as if he had joined them while assembling. *Hawk. P. C. b.* 1. *c.* 65. *s.* 3.

Proof of the violence or terror.] Evidence must be given of some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto, as are calculated to strike terror into the public ; as a show of arms, threatening speeches, or turbulent gestures. *Hawk. P. C. b.* 1. *c.* 65. *s.* 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, with the predetermined purpose of preventing the performance, it will be a riot, though no personal violence is done to any individual, and no injury done to the house. *Clifford v. Brandon*, 2 *Campb.* 358. But the unlawfulness of the object of an assembly, even though they actually carry their unlawful object into execution, does not constitute a riot, unless accompanied by circumstances of force or violence ; and in the same manner, three or more persons assembling together, peaceably, to do an unlawful act, is not a riot. *Hawk. P. C. b.* 1. *c.* 65. *s.* 5.

In some cases in which the law authorises force, the use of such force will not constitute a riot, as where a sheriff or constable, or perhaps even a private person assembles a competent number of persons, in order with force to suppress rebels, or enemies, or rioters. *Hawk. P. C. b.* 1. *c.* 65. *s.* 2. So a private individual may assemble a number of others to suppress a common nuisance, or a nuisance to his own land. Thus where a wier had been erected across a common navigable river, and a number of persons assembled, with spades and other necessary instruments, for removing it, and did remove it, it was held to be neither a forcible entry nor a riot. *Dalt. c.* 137. So an assembly of a man's friends at his own house, for the defence of his person, or the possession of his house, against such as

threaten to beat him, or to make an unlawful entry, is excusable. 5 *Burn*, 278.

Proof of the object of the rioters—private grievance.] It must appear that the injury or grievance complained of, relates to some private quarrel only, as the inclosing of lands in which the inhabitants of a certain town claim a right of common, for where the intention of the assembly is to redress public grievances, as to pull down all inclosures in general, an attempt with force to execute such intention, will amount to high treason. *Hawk. P. C. b.* 1. *c.* 65. *s.* 6. Where the object of an insurrection, says Mr. East, is a matter of a private or local nature, affecting, or supposed to affect only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures, to remove a local nuisance, to release a particular prisoner, (unless imprisoned for high treason), or even to oppose the execution of an act of parliament, if it only affect the district of the insurgents, as in the case of a turnpike act. 1 *East*, *P. C.* 75.

Proof of the guilt of the defendants.] In proving the participation of the defendants in the riot, it is not, as it seems, competent to the prosecutor to prove a riot in the first instance, and afterwards to connect the prisoners with such riot. Where the counsel for the prosecution was pursuing this course, Alderson, J., interposed, and said that he must first identify the prisoners as having been present. He stated that it had been held by the judges at the special commission at Salisbury, in 1830, that the prisoners must first be identified as having been present, forming part of the crowd, and that the fifteen judges had confirmed the holding of the special commission. *Nicholson's case*, *Lewin*, *C. C.* 300.

In the above case, it was stated by the counsel for the prosecution, that an opposite course had been pursued in the *Manchester case*.

On the trial of an action of trespass, the issues were, whether a conspiracy had existed to excite discontent and disaffection, and also whether there had been an unlawful assembly to the terror of the inhabitants of the town of Manchester. For the purpose of proving the affirmative, evidence was offered of large bodies of men having been seen, on the morning of the day in question, marching along the road, and of expressions made use of by them tending to show that they were proceeding to a place called Whitemoss, for the purpose of being drilled. Evidence was also offered of drillings in the neighbourhood of Manchester, previous

to the meeting, and a witness was asked whether the proceedings which he saw created any alarm in his mind. Another witness stated that he saw several parties of men proceeding to the place where there had been drillings, and he was asked as to their having solicited him to join them, and as to declarations made by some of those persons with regard to the object and purpose of their going thither. The whole of this evidence was objected to, but was admitted by Holroyd, J., and on a motion for a new trial, the Court of King's Bench held that it had been rightly received. *Redford v. Birley*, 3 *Stark. N. P. C.* 76.

Proof upon prosecution under the riot act.] By the statute 1 Geo. 1. stat. 2. c. 5. s. 1, (commonly called the riot act,) it is enacted, that if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by one or more justice or justices of the peace, or by the sheriff of the county, or by his under-sheriff, or by the mayor, bailiff, or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation, to be made in the King's name in the form thereinafter directed, to disperse themselves, and peacably to depart to their habitations or to their lawful business, shall to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such remaining or continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death, as in the case of felony, without benefit of clergy.

The third section gives the form of the proclamation, concluding with the words, "God save the King." Where, in the reading of the proclamation these words were omitted, it was held that the persons continuing together, did not incur the penalties of the statute. *Child's case*, 4 *C. & P.* 442.

Upon an indictment under this statute the prosecutor must prove, 1, that the prisoners with others, to the number of twelve, were unlawfully, riotously, and tumultuously assembled together; 2, that proclamation was made in the form given by the third section of the statute; 3, that the defendants, with others, to the number of twelve, remained or continued unlawfully, riotously, and tumultuously together, for one hour or more after the proclamation; lastly, it must be proved that the prosecution has been commenced within twelve months after the offence committed. 1 G. 1. st. 2. c. 5. s. 8.

The second or subsequent reading of the act does not do away with the effect of the first reading, and the hour is to be com-

puted from the time of the first reading. *Woolcock's case*, 5 *C. & P.* 517.

If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, the case is within the act, and whether there was a cessation or not is a question for the jury. *Woolcock's case*, 5 *C. & P.* 517.

Proof of demolishing buildings, &c.] The offence of demolishing buildings by rioters (formerly provided against by the statutes 1 G. 1. st. 2. c. 5, 9 G. 3. c. 29, 52 G. 3. c. 130, and 56 G. 3. c. 125, repealed) is now forbidden by the 7 & 8 Geo. 4. c. 30, by the eighth section of which it is enacted, that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Although the prisoners are charged only with a *beginning* to demolish, pull down, &c., yet it must appear that such a beginning was with intent to demolish the whole. The beginning to pull down, said Parke, J., in a case where the prisoners were so charged, means not simply a demolition of a part, but of a part with intent to demolish the whole. If the prisoners meant to stop where they did, (i. e. breaking windows and doors) and do no more, they are not guilty; but if they intended, when they broke the windows, &c. to go farther, and destroy the house, they are guilty of a capital offence. If they had the full means of going further, and were not interrupted, but left off of their own accord, it is evidence that they meant the work of demolition to stop where it did. It was proved that the parties began by breaking the windows, and having afterwards entered the house, set fire to the furniture; but no part of the house was burnt. Parke, J., said to the jury, "If you think the prisoners originally came, without intent to demolish, and that the setting fire to the premises was an after thought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning

to destroy. If they came originally without such intent, but afterwards set fire to the house, the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner." *Ashton's case, Lewin, C. C.* 296.

The same rule was laid down in the two following cases:— The prisoners about midnight came to the house of the prosecutor, and having in a riotous manner burst open the door, broke some of the furniture, and all the windows, and did other damage, after which they went away, though there was nothing to prevent their committing further injury. Littledale, J., told the jury that this was not a "beginning to demolish," unless they should be satisfied that the ultimate object of the rioters was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. *Thomas's case*, 4 *C. & P.* 237, *and see* 6 *C. & P.* 333.

Where an election mob pursued a person who took refuge in a house, upon which they attacked the house, shouting, "pull it down," and broke the door and windows, and destroyed much of the furniture, but being unable to find the person they were in search of, went away; Tindal, C. J., ruled, that the case was not within the statute, the object of the rioters not being to destroy the house, but to secure the person they were in search of. *Price's case*, 5 C. & P. 510.

But the case may fall within the statute, though the intent to demolish may be accompanied with another intent, which may have influenced the conduct of the rioters. Thus, where a party of coal-whippers having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, collected a mob, and went to the house where he kept his pay-table, exclaiming, that they would murder him, and began to throw stones, &c., and broke the windows and partitions, and part of a wall, and after his escape, continued to throw stones, &c., till stopped by the police; Gurney, B., ruled that the parties might be convicted under the 7 & 8 G. 4. c. 30. s. 8, of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to demolish the house, on account of its having been used by him. *Batt's case*, 6 *C. & P.* 329.

Proof of a rout.] A rout seems to be, according to the general opinion, a disturbance of the peace by persons assem-

bling together, with an intention to do a thing, which, if executed, would make them rioters, and actually making a motion towards the execution thereof. *Hawk. P. C. b.* 1. *c.* 65. *s.* 8. 1 *Russell*, 253.

Proof of an unlawful assembly.] Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the King's subjects, seems properly to be called an unlawful assembly, as where great numbers complaining of a common grievance, meet together armed in a warlike manner, in order to consult respecting the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. *Hawk. P. C. b.* 1. *c.* 65. *s.* 9. The circumstances which constitute an unlawful assembly were much discussed in the case of *Redford v. Birley*, 3 *Stark. N. P. C.* 76. In that case, Holroyd, J., said, an unlawful assembly is where persons meet together in a manner and under circumstances which the law does not allow, but makes it criminal in those persons meeting together in such a manner, knowingly, and with such purposes as are in point of law criminal. He then proceeded to state what may constitute an unlawful assembly, adopting the language used by Bayley, J., in *Hunt's case* at York. All persons assembled to sow sedition, and bring into contempt the constitution, are an unlawful assembly. With regard to meetings for drilling, he said, If the object of the drilling is to secure the attention of the persons drilled to disaffected speeches, and give confidence by an appearance of strength to those willing to join them, that would be illegal ; or if they were to say, we will have what we want, whether it be agreeable to law or not, a meeting for that purpose, however it may be masked, if it is really for a purpose of that kind would be illegal. If the meeting, from its general appearance, and all the accompanying circumstances, is calculated to excite terror, alarm and consternation, it is generally criminal and unlawful.

A question, with regard to the admissibility of evidence, showing previous meetings for the purpose of drilling, arose in *Hunt's case*, 3 *B. & A.* 566, which was an indictment containing counts for a conspiracy, unlawful assembly and riot ; and in which the jury found the defendants guilty, on the count for an unlawful assembly. On a motion for a new trial, on the ground that this evidence had been improperly received, the application was rejected. Abbott, C. J., said, " It was shown, that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies, to a certain extent arranged and organised, and with a regularity of step and movement, resembling those of a military march,

though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say, that they were left to the consideration of the jury in a manner less favourable to the defendants than the evidence warranted. And if this appearance was in itself proper for the consideration of the jury, it must have been proper to show to them, that at the very place from which one of these bodies came, a number of persons had assembled before day break, and had been formed and instructed to march as soon as there was light enough for such an operation, and that some of the persons thus assembled had grossly ill-treated two others, whom they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a King's man again, or to name the name of a King; and that another of the bodies that went to the place of meeting, expressed their hatred towards this person by hissing as they passed his doors. These matters were in my opinion, unquestionably competent evidence upon the general character and intention of the meeting."

ROBBERY.

Statute 7 & 8 *G.* 4. *c.* 29 . . . 733
Proof of the goods, &c. taken . . . 733
Proof of the taking 734
felonious intent . . . 735
from the person . . . 736
in presence of the owner . . . 737
against the will of the owner . . 737
Proof of the violence or putting in fear—violence—degree of 738
under pretence of legal or rightful proceeding . 739
mode of putting in fear . . . 740
degree of fear 742
Proof of being put in fear . . . 743
injury to the person . . . 743
fear of injury to property . . 744
fear of injury to reputation . . 744
must be before the taking . . . 754

Robbery from the person, which is a felony at common law, is thus defined :—a felonious taking of money or goods of any value from the person of another, or in his presence against his will, by violence or putting him in fear. 2 *East, P. C.* 707.

Statute 7 *&* 8 *G.* 4. *c.* 29.] It is now a statutable offence by the 7 & 8 G. 4. c. 29. s. 6, which enacts, that if any person shall rob any other person of any chattel, money, or valuable security, every such offender being convicted thereof, shall suffer death as a felon.

The provisions of the same statute with regard to stealing from the person, assaulting with intent to rob, and demanding property with menaces, or by force with intent to steal ; the accusing or threatening to accuse of any infamous crime ; and the sending of threatening letters demanding money, are all separately noticed under distinct heads.

On a prosecution for a robbery, the evidence will be, 1st, proof that certain goods, &c. were taken ; 2d, that they were taken with a felonious intent ; 3d, from the person or in the presence of the owner ; 4th, against his will ; 5th, that they were taken, either by violence or by putting the owner in fear.

Proof of the goods, &c., taken.] It must be proved that some property was taken, for an assault with intent to rob is an offence of a different and inferior nature. 2 *East, P. C.* 707. But the value of the property is immaterial, a penny, as well as a pound, forcibly extorted, constitutes a robbery, the gist of the offence being the force and terror. 3 *Inst.* 69. 1 *Hale, P. C.* 532. 2 *East, P. C.* 707. 2 *Russell,* 62. Thus where a man was knocked down and his pockets rifled, but the robbers found nothing, except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. *Bingley's case, coram Gurney, B.,* 5 *C. & P.* 602. In the following case it was held that there was no property in the prosecutor so as to support an indictment for robbery. The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room for the purpose of extorting money from him. Upon a table covered with black silk were two candlesticks covered also with black, a pair of large horse pistols ready cocked, a tumbler glass filled with gunpowder, a saucer with leaden balls, two knives, one of them a prodigiously large carving knife, their handles wrapped in black crape, pens and inkstand, several sheets of paper, and two ropes. The prisoner, Mrs. Phipoe, seizing the carving knife, and threatening to take away the prosecutor's life, the latter was compelled to sign a promissory note for 2000*l.* upon a piece of stamped paper which had been provided by the prisoner. It was objected that there was no property in the prosecutor,

and the point being reserved for the opinion of the judges, they held accordingly. They said that it was essential to larceny, that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and ink were the property of Mrs. Phipoe, and the delivery of it by her to him, could not under the circumstances of the case be considered as vesting it in him, but if it had, as it was a property of which he was never even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. *Phipoe's case*, 2 *Leach*, 673. 2 *East, P. C.* 599.

Proof of the taking.] In order to constitute a *taking*, there must be a *possession* by the robber. Therefore, if a man having a purse fastened to his girdle is assaulted by a thief, who, in order more readily to get the purse, cuts the girdle, whereby the purse falls to the ground, this is no taking of the purse, for the thief never had it in his possession. 1 *Hale, P. C.* 533. But if the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, without taking it up again, it would have been robbery, for it would have been once in his possession. *Id.* However short the period of possession, it is sufficient. The prisoner taking the prosecutor's purse immediately returned it, saying, "If you value your purse you will please to take it back, and give me the contents of it;" the prosecutor took it back, and the prisoner at that moment was apprehended. The Court (Hotham, B., and Willes, J.), held, that though the prosecutor did not eventually lose either his purse or his money, yet as the prisoner had in fact demanded the money, and under the impulse of that threat and demand, the property had been once taken from the prosecutor by the prisoner, it was in strictness of law a sufficient *taking* to complete the offence, although the prisoner's possession had continued for an instant only. *Peat's case*, 1 *Leach*, 228, 2 *East, P. C.* 557. *See Lapier's case*, 1 *Leach*, 326, *ante, p.* 471. It has been observed with regard to cases of this description, that though it was formerly held that a sudden taking or snatching of any property from a person unawares was sufficient to constitute robbery, the contrary doctrine appears to be now established. (*See Gnosil's case*, 1 *C. & P.* 304,) and that no taking by violence will at the present day be considered as sufficient to constitute robbery, unless some injury be done to the person (*as in Lapier's case, ante, p.* 471,) or unless there be

some previous struggle for the possession of the property, or some force used to obtain it. 2 *Russell*, 63, *vide post*.

Proof of the taking—felonious intent.] The robbery must be *animo furandi*, with a felonious intent to appropriate the goods to the offender's own use. And there must be a felonious intent with regard to the goods charged in the indictment, it is not enough that the prisoner had at the same time an intent to steal other goods. A. assaulted B. on the highway with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of B.'s horse, and threw that and some bread which B. had in paniers about the highway, but did not take any thing from B. Upon a conference of all the judges, this was resolved to be no robbery. *Anon.* 2 *East, P. C.* 662.

Though the party charged take the goods with violence and menaces, yet if it be under a *bonâ fide* claim, it is not robbery. The prisoner had set wires in which game was caught. The gamekeeper finding them, was carrying them away when the prisoner stopped him, and desired him to give them up. The gamekeeper refused, upon which the prisoner lifting up a large stick, threatened to beat out the keeper's brains if he did not deliver them. The keeper fearing violence delivered them. Upon an indictment for robbery, Vaughan, B., said, I shall leave it to the jury to say, whether the prisoner acted upon an impression, that the wires and pheasant were his own property, for, however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bonâ fide* impression, that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail. The prisoner was acquitted. *Hall's case*, 3 *C. & P.* 409.

It sometimes happens that the original assault is not made with the particular felonious intent of robbing the party of the property subsequently taken; but if the intent arises before the property taken, it is sufficient; as where money, offered to a person endeavouring to commit a rape, is taken by him. The prisoner assaulted a woman, with intent to ravish her, and she, without any demand made by him, offered him money, which he took, and put into his pocket, but continued to treat the woman with violence in order to effect his original purpose, till he was interrupted. A majority of the judges held this to be robbery, on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which, it was clear, she would not have done voluntarily, and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original attempt was to commit a rape. *Blackham's case*, 2 *East, P. C.* 711.

Where several persons went out at night for the purpose of

poaching, and encountering a gamekeeper, assaulted him, and after beating him severely, left him, when one of them, named Williams, returned and robbed him; on an indictment against all for robbery, Park, J., said, it appears that Williams alone is guilty of this robbery. There was no common intent to steal the keeper's property. They went out with a common intent to kill game, and perhaps to resist the keepers; but the whole intention of stealing the property is confined to Williams alone. *Hawkins's case*, 3 *C. & P.* 392.

The question of the *animus furandi* often arises in cases where, after a quarrel and assault, part of the property of some of the parties engaged in the transaction has been carried away. The question in these cases is whether the articles were taken in frolic, or from accident, or from malice, but not *animo furandi*. It is said, by a writer on the criminal law of Scotland, that it behoves prosecutors to be rigidly on their guard against such perversions of the real transaction which has occurred, and to endeavour to restrict charges of this serious description to cases of real felonious depredation. *Alison, Princ. Crim. Law of Scotland*, 238. Several cases, to illustrate this, are mentioned by Mr. Alison. A scuffle took place, on the high road, between the prosecutor and the prisoner; in the course of which, the former was deprived of a ruling measure, his hat, and a quantity of articles out of his pockets, which were afterwards found by the road-side; but as it turned out, that he was tipsy at the time, and the articles might have been lost in the struggle, without any intent of felonious appropriation on the prisoner's part, he was acquitted. *Bruce's case*, *Alison, Prin. Crim. Law of Scot.* 238. But, continues Mr. Alison, it may happen that an assault is commenced from some other motive, and in the course of it a depredation, done evidently *lucri causâ*, is committed, suggested perhaps by the unforeseen exposure of some valuable property, or the defenceless condition to which the owner is reduced in the course of the affray. In such a case, it is not the less robbery that the intention to appropriate arose after the assault. The prisoner, from malice, lay in wait, and assaulted the witness; a scuffle ensued, during which the witness lost a bundle, which he never recovered. The Court laid it down, that if the intention of depredation existed at the moment of the taking, the offence was robbery, though the assault commenced from a different motive; but the jury, doubting the evidence, acquitted of the robbery, and convicted only of the assault. *Young's case*, *Alison*, 239.

Proof of the taking—from the person.] It is not necessary that the goods should actually be taken from off the person of the prosecutor; if they are in his personal custody, and are taken in his presence, it is sufficient. But it is otherwise, where they are in the personal custody of a third person. The two pri-

soners were indicted for assaulting the prosecutor, and robbing him of a bundle. It appeared that the prosecutor had the bundle in his own personal custody, in a beer-shop, and when he came out, gave it to his brother, who was with him, to carry it for him. While on the road, the prisoners assaulted the prosecutor; upon which, his brother laid down the bundle in the road, and ran to his assistance. One of the prisoners then took up the bundle, and made off with it. Vaughan, B., intimated an opinion, that the indictment was not maintainable, as the bundle was in the possession of another person at the time of the assault committed. Highway robbery was the felonious taking of the property of another by violence, against his will, either from his person or in his presence. The bundle, in this case, was not in the prosecutor's possession. If the prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it? The prisoners were convicted of simple larceny. *Fallows's case*, 5 *C. & P.* 508.

Proof of the taking—in presence of the owner.] The taking need not be by the immediate delivery of the party to the offender, or immediately from the person of the party robbed; it is sufficient if it be in his presence. The instances given by Lord Hale are, where a carrier is driving his pack-horses, and the thief takes his horse or cuts his pack, and takes away the goods; or where a thief comes into the presence of A., and with violence, and putting A. in fear, drives away his horse, cattle, or sheep. 2 *Hale, P. C.* 533. But it must appear in such cases, that the goods were taken in the presence of the prosecutor. Thus where thieves struck money out of the owner's hand, and by menaces drove him away, to prevent his taking it up again, and then took it up themselves; these facts being stated in a special verdict, the Court said that they could not intend that the thieves took up the money in the sight or presence of the owner, and that, as the striking of the money out of the hand was without putting the owner in fear, there was no robbery. *Francis's case*, 2 *Str.* 1015, *Com. Rep.* 478, 2 *East, P. C.* 708. And the same was resolved in another case, with the concurrence of all the judges. *Grey's case*, 2 *East, P. C.* 708. Where robbers, by putting in fear, made a waggoner drive his waggon from the highway, in the day-time, but did not take the goods till night; some held it to be a robbery from the first force, but others considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves. 2 *East, P. C.* 707. 2 *Russell*, 66.

Proof of the taking—against the will of the owner.] It must appear that the taking was against the will of the owner. Several persons conspired to obtain for themselves the rewards given

by statute for apprehending robbers on the highway. The robbery was to be effected upon Salmon, one of the confederates, by Blee, another of the confederates, and two strangers procured by Blee. It was expressly found, that Salmon consented to part with his goods under pretence of a robbery, and that, for that purpose, he went to a highway, at Deptford, where the colourable robbery took place. The judges were of opinion that this did not amount to robbery in any of the prisoners, because Salmon's property was not taken from him against his will. *M'Daniel's case, Fost.* 121, 128. But it is otherwise where the party robbed delivers money to the thief, though, at the same time, with the intent and power of immediately apprehending him. One Norden, having been informed of several robberies by a highwayman, resolved to apprehend him. For this purpose, he put a little money and a pistol in his pocket, and took a chaise. The robber stopped the chaise, and demanded money. Norden gave him what money he had, jumped out of the chaise with the pistol in his hand, and with some assistance apprehended the prisoner. The prisoner was convicted of this robbery, and the conviction was approved of by Mr. Justice Foster, who distinguishes it from the former case, on the ground that there was no concert or connexion between Norden and the highwayman. *Anon. Foster*, 129.

Proof of the violence or putting in fear—violence—degree.] It must be proved that the goods were taken either by violence, or that the owner was put in fear; but either of these facts will be sufficient to render the felonious taking a robbery. 2 *East, P. C.* 708. 2 *Russell*, 67. Where violence is used, it is not necessary to prove actual fear. I am very clear, says Mr. Justice Foster, that the circumstance of actual fear, at the time of the robbery, need not be strictly proved. Suppose the true man is knocked down without any previous warning, to awaken his fears, and lies totally insensible, while the thief rifles his pockets, is not this a robbery? *Foster*, 128. And if fear be a necessary ingredient, the law *in odium spoliatoris* will presume it, where there appears to be so just a ground for it. *Id.* 2 *East, P. C.* 711.

With regard to the degrees of violence necessary, it has been seen, *ante, p.* 734, that the sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is not sufficient to constitute robbery, unless some injury be done to the person, or unless there be some previous struggle for the possession of the property. In *Lapier's case, ante, p.* 471, it was held robbery, because an injury was done to the person. 2 *East, P. C.* 709. A boy was carrying a bundle along the street, when the prisoner ran past him, and snatched it suddenly away, but being pursued, let it fall. Being indicted for robbery, the Court (Hotham, B., and Adair, Serjt.,) said, the evidence in

this case does not amount to a robbery; for though he snatched the bundle, it was not with that degree of force and terror that is necessary to constitute this offence. *Macauley's case*, 1 *Leach*, 287. And the same has been resolved in several other cases, in which it has appeared that there was no struggle for the property. *Baker's case*, 1 *Leach*, 290. *Robins's case*, *Id.* (*n.*) *Davies's case*, *Id.* (*n.*) *Horner's case*, *Id.* 191. (*n.*)

But where a degree of violence is used sufficient to cause a personal injury, it is robbery; as where, in snatching a diamond pin fastened in a lady's hair, part of the hair was torn away at the same time. *Moore's case*, 1 *Leach*, 335, *and see Lapier's case*, *Id.* 320, *ante*, *p.* 471. A case is said to have been mentioned by Holroyd, J., which occurred at Kendal, and in which the evidence was that a person ran up against another, for the purpose of diverting his attention while he picked his pocket; and the judges held, that the force was sufficient to make it a robbery, it having been used with that intent. *Anon. Lewin, C. C.* 300. It appeared in evidence that the prisoner and others, in the streets of Manchester, hung around the prosecutor's person, and rifled him of his watch and money. It did not appear that any actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not vain. Bayley, J., on the trial of these parties for robbery, said, in order to constitute robbery, there must be either force or menaces. If several persons surround another so as to take away his power of resistance, this is robbery. *Hughes's case*, *Lewin, C. C.* 301.

So if there be a struggle between the offender and the owner, for the possession of the property, it will be held to be such a violence as to render the taking robbery. The prisoner was indicted for taking a gentleman's sword from his side, *clam et secreté*; but, it appearing that the gentleman perceived the prisoner had laid hold of his sword, and that he himself laid hold of it at the same time and struggled for it, this was adjudged robbery. *Davies's case*, 2 *East*, *P. C.* 709. The prisoner coming up to the prosecutor in the street, laid violent hold of the seals and chains of his watch, and succeeded in pulling it out of his fob. The watch was fastened with a steel chain, which went round his neck, and which prevented the prisoner from immediately taking the watch; but, by pulling, and two or three jerks, he broke the steel chain and made off with the watch. It was objected that this came within the cases as to snatching; but the judges, on a case reserved, were unanimously of opinion that the conviction was right, for that the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for that purpose. *Mason's case*, *Russ. & Ry.* 419.

Proof of violence—Under pretence of legal or rightful proceedings.] Violence may be committed as well by actual

unlawful force, as under pretence of legal and rightful proceedings. Merriman, carrying his cheeses along the highway in a cart, was stopped by one Hall, who insisted on seizing them for want of a permit, (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary.) On an altercation, they agreed to go before a magistrate and determine the matter. In the meantime other persons, riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the purpose, carried off the goods in Merriman's absence. It was objected that this was no robbery, there being no force used; but Hewitt, J., overruled the objection, and left it to the jury, who found it robbery, and brought in a verdict for the plaintiff; and, upon a motion for a new trial in K. B., the Court held that the verdict was right. *Merriman v. Hundred of Chippenham*, 2 *East*, *P. C.* 709.

The prosecutrix was brought before a magistrate by the prisoner, into whose custody she had been delivered by a headborough, on a charge of assault. The magistrate recommended the case to be made up. The prisoner, (who was not a peace officer,) then took her to a public house, treated her very ill, and finally handcuffed and forced her into a coach. He then put a handkerchief into her mouth, and forcibly took from her a shilling, which she had previously offered him, if he would wait till her husband came. The prisoner then put his hand in her pocket, and took out three shillings. Having been indicted for this as a robbery, Nares, J., said, That, in order to commit the crime of robbery, it was not necessary the violence used to obtain the property should be by the common modes of putting a pistol to the head, or a dagger to the breast; that a violence, though used under a colourable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, that if they thought the prisoner had, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making a resistance, and took the money with a felonious intent, they should find him guilty. The jury having found accordingly, the judges, upon a case reserved, were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence he had committed was clearly a robbery. *Gascoigne's case*, 1 *Leach*, 280, 2 *East*, *P. C.* 709.

Proof of putting in fear—mode of putting in fear.] If there has not been such violence used, as to raise the offence from that of simple larceny to that of robbery, the prosecutor must

show that he was *put in fear*—a fear of injury either to his person, his property, or his reputation.

In order to show a putting in fear, it is not necessary to prove that menaces or threats of violence were made use of by the offender. For instance, under pretence of begging, the prisoner may put the prosecutor in fear. The law (says Mr. Justice Willes), will not suffer its object to be evaded by an ambiguity of expression; for, if a man, *animo furandi*, says "Give me your money;" "lend me your money;" "make me a present of your money;" or words of the like import, they are equivalent to the most positive order or demand; and if anything be obtained in consequence, it will form the first ingredient in the crime of robbery. *Donnally's case*, 1 *Leach*, 196. During the riots in London, in 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, and on his opening it said "God bless your honour, remember the poor mob." The prosecutor told him to go along; upon which he said he would go and fetch his captain. He went, and soon after the mob came, to the number of 100, armed with sticks, and headed by the prisoner on horseback, his horse led by the boy. The bye-standers said, "You must give them money." The boy said "Now I have brought my captain;" and some of the mob said "God bless this gentleman, he is always generous." The prosecutor asked the prisoner "how much;" and he answered "half-a-crown;" on which the prosecutor, who had before intended to give only a shilling, gave the prisoner half-a-crown, and, the mob giving three cheers, went to the next house. This was held to be robbery, by Nares, J., and Buller, J., at the Old Bailey. *Taplin's case*, 2 *East*, *P. C.* 712.

There may be a putting in fear where the property is taken under colour of regular or legal proceedings, as well as in cases where it is taken by actual violence. See the cases cited *ante*, *p.* 740.

So there may be a putting in fear where the robbery is effected under colour of a purchase. Thus if a person, by force or threats, compel another to give him goods, and by way of colour, oblige him to take less than the value, this is robbery. As where the prisoner took a bushel and a half of wheat, worth 8*s.*, and forced the owner to take 13*d.* for it, threatening to kill her if she refused, it was clearly held by all the judges to be a robbery. *Simon's case*, 2 *East*, *P. C.* 712. Again, where the prisoner and a great mob came to the prosecutor, who had some corn, and one of them said, if he would not sell, they were going to take it away; and the prisoner said, they would give him 30*s.* a load, and if he would not accept that, they would take the corn away; upon which the prisoner sold it for 30*s.*, though it was worth 38*s.*, this was held to be robbery. *Spencer's case*, 2 *East*, *P. C.* 712.

In these cases the amount of the money may raise a question for the jury, whether or not the taking was felonious; for, though there may be a putting in fear, yet if in fact the party had not the *animus furandi*, it is no felony. A traveller met a fisherman with fish, who refused to sell him any; and he, by force and putting in fear, took away some of his fish, and threw him money much above the value of it. Being convicted of robbery, judgment was respited, because of the doubt whether the intent was felonious. *The Fisherman's case*, 2 *East*, *P. C.* 661. It has been observed, that this was properly a question for the jury to say whether, from the circumstance of the party's offering the full value, his intention was not fraudulent, and consequently not felonious. 2 *East*, *P. C.* 662. If the original taking was felonious, the payment would make no distinction.

One of the most common modes of effecting a robbery is by menaces and threats. These are said to be a constructive violence, and as such, sufficient to render the felonious taking of goods from the person, robbery. But it is not every species of threat that will be accounted sufficient for this purpose. The distinction is well stated by a writer on the criminal law of Scotland, which, in this respect, corresponds with our own. If, says Mr. Alison, the threat be of instant, or near and personal danger, as if matches be exhibited, by which it is proposed immediately to set fire to the house, or cords be produced for binding the person, preparatory to dragging him on a false charge to gaol, there seems no difference between such a case, and the extortion of money by the menaces of immediate death. But if the threat be of a future or contingent danger, and such as by the interposition of law, or by other means may be averted, the crime is not to be considered as robbery, but as oppression, which is a crime *sui generis*; more especially, if in consequence of such threats, the money be delivered not *immediately*, but *ex intervallo*, as by sending it by letter, placing it under a stone designed by the criminal, or the like. In such cases, the crime is not considered as robbery, any more than if the money had been obtained under the terror of an incendiary letter. *Alison*, *Princ. Crim. Law of Scotl.* 231. *See Jackson's case*, 1 *East*, *P. C. Addenda* xxi. *post.*

Proof of the putting in fear—the degree of fear.] It is a question for the jury, whether the circumstances accompanying the commission of the offence were such, as reasonably to create fear in the breast of the party assaulted; and it can seldom happen that such a presumption may not properly be made. It is not, says Willes, J., necessary that there should be *actual danger*, for a robbery may be committed without using an offensive weapon, as by using a tinder-box, or candlestick, instead of a pistol. A reasonable fear of *danger* caused by the

exercise of a constructive violence is sufficient, and where such a terror is impressed upon the mind, as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it *against his will*. Nor need the degree of constructive violence be such, as in its effects necessarily imports a probable injury, for when a villain comes and demands money, no one knows how far he will go. *Donnally's case*, 1 *Leach*, 196, 197, 2 *East*, *P. C.* 727. The rule, as deduced from the last cited case, is thus laid down by Mr. East. On the one hand, the fear is not confined to an apprehension of bodily injury, and on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it, through the influence of the terror impressed; in which case fear supplies, as well in sound reason, as in legal construction, the place of force, or an actual taking by violence or assault upon the person. 2 *East*, *P. C.* 713. *Ibid.* 727.

In *Jackson's case*, 1 *East*, *P. C. Addenda* xxi. *post*, it seems to have been considered that the fear must be of that description which will operate *in constantem virum*. That case, however, was one of a peculiar nature, and it certainly cannot be required, in order to constitute robbery, in every case, that the terror impressed should be that of which a man of constancy and courage would be sensible. It has been well remarked, that in estimating the degree of violence which will be held sufficient to support a charge of robbery, regard is to be had to the age, sex, and situation of the party assaulted, it being justly deemed that a much smaller degree of threats and violence will be sufficient to effect the spoliation from a woman or an infirm person, in a remote situation, than from a young or robust man in a frequented spot. *Alison, Princ. Crim. Law of Scotl.* 229, *Burnett*, 146.

Proof of being put in fear—injury to the person.] Proof of such circumstances as may reasonably induce a fear of personal injury, will be sufficient to support the charge of robbery. It would not be sufficient to show in answer, that there was no real danger, as that the supposed pistol was in fact a candlestick, *see ante*, *p.* 742; in short, danger to the person may be apprehended from every assault with intent to rob, and a jury would be justified in presuming that the party assaulted was under the influence of fear, with regard to her personal safety. It seems also, that fear of violence to the person of the child of the party, whose property is demanded, is regarded in the same light as fear of violence to his own person. Hotham, B., in *Donnally's case*, 2 *East*, *P. C.* 718, stated, that with regard to the case put in argument, if a man walking with his child, and delivering

his money to another, upon a threat, that unless he did so, he would destroy the child, he had no doubt but that it was sufficient to constitute a robbery. So in *Reave's case*, 2 *East, P. C.* 735, Eyre, C. J., observed, that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in, unless he gave him money.

Proof of the putting in fear—fear of injury to property.] It is sufficient to prove that the conduct of the prisoner put the prosecutor in fear for the safety of his *property*. During certain riots in Cornwall, the prisoners with a mob, came to the prosecutor's house, and said they must have from him the same they had had from his neighbours, which was a guinea, else that they would tear down his mow of corn, and level his house. The prosecutor gave them 5*s*., but they demanded, and received 5*s*. more, being terrified. They then opened a cask of cyder, and drank part of it, eat some bread and cheese, and the prisoners carried away a piece of meat. The prisoners were indicted and convicted of robbing the prosecutor of 10*s*. There was also another count for putting the prosecutor in fear, and taking from him, in his dwelling-house, a quantity of cider, &c., and it was held robbery in the dwelling-house. *Simons's case*, 2 *East, P. C.* 731. During the Birmingham riots, the mob entered the house, and the prisoner, who was one of them, demanded money, and said that if the prosecutor did not give his men something handsome for them to drink, his house must come down. The jury found that the prosecutor did not deliver his money from any apprehension of danger to his life or person, but from an apprehension, that if he refused, his house would at some future time be pulled down in the same manner as other houses in Birmingham. On a case reserved, a majority of the judges held this to be robbery. *Astley's case*, 2 *East, P. C.* 729. *See also Brown's case*, 2 *East, P. C.* 731, *Spencer's case*, 2 *East, P. C.* 712, *ante, p.* 741.

Proof of being put in fear—fear of injury to reputation.] There appears to be only one case in which the fear of an injury to the party's reputation, has been allowed to raise the offence of larceny from the person to robbery, *viz.* where the prisoner has threatened to accuse the prosecutor of unnatural practices. The species of terror, says Mr. Justice Ashhurst, which leads a man to apprehend an injury to his character, has never been deemed sufficient, unless in the particular case of exciting it by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. *Knewland's case*, 2 *Leach*, 730. The rule is laid down in the same case, in rather larger terms, by Mr. Jus-

tice Heath, who says, "The cases alluded to (*Donnolly's case, and Hickman's case, infra*), only go thus far—that to obtain money from a person by accusing him of that which, if proved, would carry *with it an infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided, that a mere charge of imprisonment and extortion is sufficient. 2 *Leach*, 729.

That obtaining money from a man by threatening to accuse him of unnatural practices, amounts to robbery, was decided in *Jones's case*. The prisoner, drinking with the prosecutor at a public house, asked him what he meant by the liberties he had taken with his person at the play-house? The prosecutor replied, that he knew of no liberties having been taken; upon which the prisoner said, "Damn you, sir, but you did, and there were several reputable merchants in the house who will take their oaths of it." The prisoner being alarmed, left the house, but the prosecutor following him, cried out; "Damn you, sir, stop, for if you offer to run, I will raise a mob about you;" and seizing him by the collar, continued, "Damn you, sir, this is not to be borne, you have offered an indignity to me and nothing can satisfy it." The prosecutor said, "For God's sake what would you have?" to which the prisoner answered, "A present. You must make me a present." And the prosecutor gave him three guineas and twelve shillings. The prisoner, during the whole conversation, held the prosecutor by the arm. The prosecutor swore that at the time he parted with the money, he understood the threatened charge to be an imputation of sodomy; that he was so alarmed at the idea, that he had neither courage nor strength to call for assistance, and that the violence with which the prisoner had detained him in the street, had put him in fear for the safety of his person. Upon a case reserved, the judges (absent De Grey, J. C., and Ashhurst, J., and one vacancy,) were of opinion, that although the money had been obtained in a fraudulent way, and under a false pretence, yet, that it was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it to constitute the offence of robbery. According to the report of the same case by Mr. East, their lordships said, that to constitute robbery there was no occasion to use weapons or real violence, but that taking money from a man in such a situation as rendered him not a free man, as if a person so robbed were in fear of a conspiracy against his life or character, was such a putting in fear, as would make the taking of his money under that terror a robbery, and they referred to *Brown's case*, (*O. B.* 1763.) *Jones's case*, 1 *Leach*, 139, 2 *East*, *P. C.* 714.

In the above case, it does not clearly appear whether the judges held it to be robbery, on the ground of the actual violence offered to the prosecutor in detaining him in the street by the arm, or upon the prosecutor being put in fear of an

injury to his reputation by the menaces employed. However, in subsequent cases it has been held, that it is no less robbery where no personal violence whatever has been used.

The prosecutor, passing along the street, was accosted by the prisoner, who desired he would give him a present. The prosecutor asking, for what? the prisoner said, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea. Two days afterwards the prisoner obtained a further sum of money from the prosecutor by similar threats. The prosecutor swore that he was exceedingly alarmed upon both occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life. The jury found the prisoner guilty of the robbery, and that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. The case being reserved for the opinion of the judges, they gave their opinions *seriatim*, (*see* 2 *East*, *P. C.* 716,) and afterwards the result of their deliberations was delivered by Mr. Justice Willes. They unanimously resolved, that the prisoner was rightly convicted of robbery. This, says Mr. Justice Willes, is a threat of personal violence, for the prosecutor had every reason to believe, that he should be dragged through the streets as a culprit, charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money. *Donnally's case*, 1 *Leach*, 193, 2 *East*, *P. C.* 713.

It will be observed, that in the foregoing case, the jury found that the prisoner delivered the money under an apprehension that his life was in danger, but this circumstance was wanting in the following case, where the only fear was, that of an injury to the party's reputation.

The prosecutor was employed in St. James's Palace, and the prisoner was a sentinel on guard there. One night the prosecutor treated the prisoner with something to eat in his room. About a fortnight afterwards the prisoner followed the prosecutor up stairs, and said, "I am come for satisfaction, you know what passed the other night. You are a sodomite, and if you do not give me satisfaction, I will go and fetch a sergeant and a file of men, and take you before a justice, for I have been in the black hole ever since I was here last, and I do not value my life." The prosecutor asked him what money he must have, and he said three or four guineas, and the prosecutor gave him two guineas. The prisoner took them, saying, "Mind, I don't *demand* any thing of you." The prosecutor swore that he was very much alarmed when he gave the two

guineas, and that he did not very well know what he did, but that he parted with the money under an idea of preserving his character from reproach, and not from the fear of personal violence. The jury found the prisoner guilty of the robbery, and they also found that the prosecutor parted with the money against his will, through a fear that his character might receive an injury from the prisoner's accusation. The case, being only the second of the kind, (*sed vide Jones's case, ante p.* 745.) and some doubt having prevailed with regard to *Donnally's* case, because he had not been executed, and because this case differed with regard to the nature of the *fear*, it was reserved for the opinion of the judges. Their resolution was delivered by Mr. Justice Ashhurst, who said, that the case did not materially differ from that of *Donnally*, for that the true definition of robbery is, the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or terror as to induce the party unwillingly to to part with his property; and whether the *terror* arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges were unanimously of opinion, that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes, was a sufficient *force* to constitute the crime of robbery by putting in fear. *Hickman's case*, 1 *Leach*, 278, 2 *East*, *P. C.* 728.

This decision was followed in a recent case. The prisoner came up to the prosecutor, a gentleman's servant, at his master's door, and demanded 5*l*. On being told by the prosecutor, that he had not so much money, he demanded 1*l*. and said, that if the prosecutor did not instantly give it to him, he would go to his master, and accuse him of wanting to take diabolical liberties with him. The prosecutor gave him what money he had, and the prisoner demanded his watch, or some of his master's plate. This the prosecutor refused, but went and fetched one of his coats, which the prisoner took away. He was indicted for robbing the prosecutor of his coat. The prosecutor swore that he gave the prisoner his property, under the idea of his being charged with a detestable crime, and for fear of losing both his character and his place. He stated that he was not afraid of being taken into custody, nor had he any dread of punishment. He stated also, that he was absent fetching the coat, for five minutes; that the servants were in the kitchen, but he did not consult them on account of his agitation, and because he had not a minute to spare, expecting the company to dinner immediately. On a case reserved, eleven of the judges thought

the case similar to *Hickman's* (*supra*), and that they could not, with propriety, depart from that decision. Graham B. thought that *Hickman's case* was not rightly decided, but said, that he should on this point be influenced in future by what appeared to be the general opinion of the judges. *Egerton's case, Russ. & Ry.* 375.

Upon a threat of accusing the prosecutor of unnatural practices, he promised to provide a sum of money for the prisoners, which he failed to do, upon which they said they were come from Bow Street, and would take him into custody. They accordingly called a coach, and while on their road to Bow Street, one of the prisoners stopped the coach, and said that if the prosecutor would behave like a gentleman, and procure the money, they would not prefer the charge. The prosecutor then went to the house of a friend, where he was absent about five minutes, when he returned with 10*l.*, which he gave to the prisoners. He stated that he parted with his money in the fear and dread of being placed in the situation of a criminal of that nature, had they persisted in preferring the charge against him; that he did not conceive they were Bow Street officers, though they held out the threat; that he was extremely agitated, and thought that they would have taken him to the watch-house, and under that idea, and the impulse of the moment, he parted with the money. He stated also, that he could not say that he gave his money under any apprehension of danger to his person.

In a case of this kind, where the point of violence was in question, ten of the judges were of opinion that the calling a coach, and getting in with the prosecutor was a forcible constraint upon him, and sufficient to constitute a robbery, though the prosecutor had no apprehension of further injury to his person. Lord Ellenborough, Macdonald, C. B., Lawrence, J., Chambre, J., and Graham, B., thought some degree of force or violence essential, and that the mere apprehension of danger to the character would not be sufficient to constitute this offence. Heath, J., Grose, J., Thomson, B., Le Blanc, J., and Wood, B., seemed to think it would. *Cannon's case, Russ. & Ry.* 146.

The threat in these cases must be a threat to accuse the party robbed; it is not sufficient to constitute robbery that the threat is to accuse another person, however nearly connected with the party from whom the property is obtained. The prisoner was indicted for robbing the wife of P. Abraham. It appeared that under a threat of accusing Abraham of an indecent assault, the money had been obtained, by the prisoner, from Abraham's wife. Littledale, J. said, I think this is not such a personal fear in the wife, as is necessary to constitute the crime of robbery. If I were to hold this a robbery, it would be going beyond any of the decided cases; and his lordship directed an acquittal. He said that the case was new and perplexing. He thought it was rather a misdemeanor, and even as a misdemeanor the case was new.

The principle was, that the person threatened is thrown off his guard, and had not firmness to resist the extortion, but he could not apply that principle to the wife of the party threatened. *Edward's case*, 1 *Moody & Rob.* 257, 5 *C. & P.* 518.

Where the fear, in cases of this nature, is not so much of injury to the reputation, as of some other loss, it seems doubtful how far it will be considered robbery. The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite. The prosecutor took him each time before a magistrate, who discharged him. On being discharged, the prisoner followed the prosecutor, repeated the expressions, and asked him to make him a present, saying, he would never leave him till he had pulled the house down, but if he did make him a handsome present, he would trouble him no more. He mentioned four guineas, and the prosecutor being frightened for his reputation, and in fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted, but a doubt arising in the Privy Council, the opinion of the judges was taken. Most of them thought that this was within *Hickman's case*, and nine were of opinion that that case was law, but the three others thought it not law. Lord Ellenborough thought that the prosecutor's principal inducement to part with his money was the fear of the loss of his place, and he said he should feel no difficulty in recommending a pardon; and the prisoner did, in the end, receive a pardon. *Elmstead's case*, 2 *Russell*, 86.

In these, as in other cases of robbery, it must appear that the property was delivered, or the money extorted, while the party was under the influence of the fear arising from the threats or violence of the prisoner. The prosecutor had been several times solicited for money by the prisoner, under threats of accusing him of unnatural practices. At one of those interviews the prisoner said he must have 20*l.* in cash, and a bond for 50*l.* a-year, upon which the prosecutor, in pursuance of a plan he had previously concerted with a friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and bond. At their next interview, the prosecutor offered the prisoner 20*l.*, but he refused to take it without the bond, upon which the prosecutor fetched it, and gave it, with nineteen guineas and a shilling, to the prisoner, who took them away, saying, he would not give the prosecutor any further trouble. The prosecutor deposed that when the charge was first made, his mind was extremely alarmed, and that he apprehended injury to his person and character, but that his fear soon subsided, and that he sought the several interviews with the prisoner for the purpose of parting with his property to him, in order to fix him with the crime of robbery, and to substantiate the fact of his having extorted money from him by means of the

charge; but that at the time the prisoner demanded from him the money and the bond, he parted with them without being under any apprehension, either of violence to his person, or injury to his character, although he could not say that he parted with his property voluntarily. The judges having met to consider this case, were inclined to be of opinion that it was no robbery, there being neither violence nor fear, at the time when the prosecutor parted with his money. Eyre, C. J., observed, that it would be going a step further than any of the cases, to hold this to be robbery. The principle of robbery was violence; where the money was delivered through fear, that was constructive violence. That the principle he had acted upon in such cases was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand? Therefore, where the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoner, he negatived the robbery. That this was different from *Norden's case*, (*Foster*, 129), where there was actual violence; but here there was neither actual nor constructive violence. At a subsequent meeting of the judges, the conviction was held wrong. *Reane's case*, 2 *Leach*, 616, 2 *East*, *P. C.* 734. The same point was ruled in *Fuller's case*, *Russ. & Ry.* 408, where the prosecutor made an appointment to meet the prisoner, and in the meantime procured a constable to attend, who, as soon as the prisoner received the money, apprehended him. The prosecutor stated that he parted with the money in order that he might prosecute the prisoner.

Under the circumstances of the following case, it appears to have been held that the fear was not continuing at the time of the delivery of the money, and that therefore it was no robbery. In consequence of a charge similar to that in the above cases having been made, the prosecutor procured a sum of money to comply with the demand, and prevailed upon a friend to accompany him when he went to pay it. His friend (Shelton) advised him not to pay it, but he did pay it. He swore that he was scared at the charge, and that was the reason why he parted with his money. It appeared that after the charge was first made, the prosecutor and one of the prisoners continued eating and drinking together. Shelton confirmed the prisoner's account, and said he appeared quite scared out of his wits. The judges having met to consider this case, a majority of them were of opinion that it was not robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character was upon him at the time. Most of the majority thought that in order to constitute robbery, the money must be parted with from an immediate apprehension of present danger *upon the charge* being made, and not, as in this case, after the parties had separated, and the prosecutor had time to deliberate upon

it, and apply for assistance, and had applied to a friend, by whom he was advised not to pay it; and who was actually present at the very time when it was paid; all which carried the appearance more of a composition of a prosecution than it did of a robbery, and seemed more like a calculation whether it were better to lose his money or risk his character. One of the judges, who agreed that it was not robbery, went upon the ground that there was not a continuing fear, such as could operate in *constantem virum* from the time when the money was demanded till it was paid, for in the interval he could have procured assistance, and had taken advice. The minority, who held the case to be robbery, thought the question concluded by the finding of the jury, that the prosecutor had parted with his money through fear continuing at the time, which fell in with the definition of robbery long ago adopted and acted upon, and they said it would be difficult to draw any other line. That this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for their assistance, for the money was given to prevent the public disclosure of the charge. *Jackson's case*, 1 *East, P. C. Addenda* xxi. It is suggested by Mr. East, *Id.* xxiv. (*margin*), whether this case does not in a great measure overrule *Hickman's case* (*ante, p.* 747); but it is justly observed by an eminent writer, that the circumstances of the two cases differ materially; that in *Hickman's case* the money was given *immediately* upon the charge being made, and that there was no previous application to any friend or other person from whom advice or assistance might have been procured. 2 *Russell*, 85.

There appears to have been so much doubt entertained with regard to the law, as it is to be gathered from the preceding cases, that a statutory provision has been made on the subject. By the 7 & 8 G. 4. c. 29. s. 7. it is enacted, that if any person shall accuse, or threaten to accuse any other person of any infamous crime, as thereinafter defined, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat, extort or gain from him any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

It is no defence to a charge of robbery by threatening to accuse a man of an unnatural crime, that he has in fact been guilty of such crime. Where the prisoner set up that defence, and stated that the prosecutor had voluntarily given him the money not to prosecute him for it; Littledale, J. said, that it was equally a robbery to obtain a man's money by a threat to accuse him of an infamous crime, whether the prosecutor were really guilty or not; as if he was guilty, the prisoner ought to have prosecuted him for it; and not have extorted money from

him ; but if the money was given voluntarily without any previous threat, the indictment could not be supported. The jury acquitted the prisoner. *Gardner's case*, 1 *C. & P.* 479.

The following case appears to have been regarded as ranging itself under the same class as the foregoing, but as wanting that species of fear of injury to the reputation which is necessary to constitute robbery. The prosecutrix, a servant maid, was inveigled into a mock-auction, and the door was shut. There were about twenty persons present. Refusing to bid, she was told, "you must bid before you obtain your liberty again." She, however, again refused, and at length, alarmed by their importunities, she attempted to leave the shop. Being prevented, and conceiving that she could not gain her liberty without complying, she did bid, and the lot was knocked down to her. She again attempted to go, but the prisoner, who acted as master of the place, stopped her, and told her, if she had not the money, she must pay half a guinea in part, and leave a bundle she had with her. The prisoner finding she could not comply, said, "then you shall go to Bow-street, and from thence to Newgate, and be there imprisoned until you can raise the money." And he ordered the door to be guarded, and a constable to be sent for. A pretended constable coming in, the prisoner who had kept his hand on the girl's shoulder, said, "take her, constable, take her to Bow-street, and thence to Newgate." The pretended constable said, "unless you give me a shilling you must go with me." During this conversation, the prisoner again laid one hand on the girl's shoulder, and the other on her bundle, and while he thus held her, she put her hand into her pocket, took out a shilling and gave it to the pretended constable, who said, "If Knewland (the prisoner) has a mind to release you it is well, for I have nothing more to do with you," and she was then suffered to make her escape. She stated upon oath that she was in bodily fear of going to prison, and that under that fear she parted with the shilling to the constable, as a means of obtaining her liberty ; but that she was not impressed by any fear, by the prisoner Knewland laying hold of her shoulder with one hand, and her bundle with the other ; for that she only parted with her money to avoid being carried to Bow-street, and thence to Newgate, and not out of fear or apprehension of any other personal force or violence. Upon a case reserved, the judges were of opinion that the circumstances of this case did not amount to robbery. After adverting to the cases of threats to accuse persons of unnatural offences, Mr. Justice Ashhurst, delivering the resolution of the judges, thus proceeds : In the present case the threat which the prisoners made was to take the prosecutor to Bow-street, and from thence to Newgate, a species of threat, which in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery ; for it was only a

threat to put her into the hands of the law, and an innocent person need not in such circumstances be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection and set her free. The terror arising from such a source cannot therefore be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress, for which the party injured may have a civil remedy by action, which could not be, if the fact amounted to felony. As to the circumstances affecting the other prisoner, (Wood, the pretended constable,) it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale-room; and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it. The judges therefore were all of opinion, that however the prisoners might have been guilty of a *conspiracy* or other misdemeanor, they could not in any way be considered guilty of the crime of robbery. *Knewland's case*, 2 *Leach*, 721, 2 *East*, *P. C.* 732.

Although this decision, so far as the question of putting in fear is concerned, may perhaps be regarded as rightly decided upon the express declaration of the prosecutrix herself, that she parted with the money merely to avoid being carried to Bow-street, and thence to Newgate, yet there are some portions of the opinion of the judges, which appear to be at variance with the rules of law respecting robbery. The statement that *terror* no less than *force* is a component part of the complex idea annexed to the term robbery, is not in conformity with the various decisions already cited, from which it appears that either violence *or* putting in fear is sufficient to constitute a robbery. There seems also to be a fallacy in the reasoning of the Court, with regard to the threats of imprisonment held out to the prosecutrix. The impression made by such threats upon any person of common experience and knowledge of the world (and such the prosecutrix must be taken to have been) would be, not that the prisoners had *in fact* any intention of carrying the injured party before a magistrate, or of affording any such opportunity of redress, but that other artifices, (as in the instance of the pretended constable), would probably be resorted to, in order to extort money. It is difficult to imagine any case in which a party might with more reason apprehend violence and injury, both to the person and to the property, than that in which the prosecutrix was placed, and it is still more difficult to say, that there was not such *violence* resorted to, as independently of the question of putting in fear, rendered the act of the prisoners (supposing it to have been done *animo furandi*, of which there could be little doubt) an act of robbery. In *Gascoigne's case*, 1 *Leach*, 280, 2 *East*, *P. C.* 709, *ante*,

p. 740, the prisoner not only threatened to carry the prosecutrix to prison, but actually did carry her thither, whence she was in due course discharged, and yet the nature of the threat did not prevent the offence from being considered a robbery. In that case indeed some greater degree of personal violence was used, and the money was taken from the prosecutrix's pocket by the prisoner himself, but it is clearly immaterial whether the offender takes the money with his own hand, or whether the party injured delivers it to him, in consequence of his menaces.

Proof of the putting in fear—must be before the taking.] It must appear that the property was taken while the party was under the influence of the fear, for if the property be taken first, and the menaces or threats, inducing the fear, be used afterwards, it is not robbery. The prisoner desired the prosecutor to open a gate for him. While he was so doing, the prisoner took his purse. The prosecutor seeing it in the prisoner's hands, demanded it, when the prisoner answered, "Villain, if thou speakest of this purse, I will pluck thy house over thy ears," &c., and then went away, and because he did not take it with violence, or put the prosecutor in fear, it was ruled to be larceny only, and no robbery, for the words of menace were used after the taking of the purse. *Harman's case*, 1 *Hale, P. C.* 534, 1 *Leach*, 198. *(n.)*

ROBBERY.

ASSAULT WITH INTENT TO ROB.

Statute 7 *&* 8 *G.* 4. *c.* 29. . . 754
Proof of the assault 755
Proof of the intent to rob . . . 755

Statute 7 *&* 8 *G.* 4. *c.* 29.] Before the statute 7 & 8 Geo. 4. c. 29. s. 6, the offence of assaulting with intent to rob was provided against by the 4 Geo. 4. c. 54. s. 5,

(repealing the 7 G. 2. c. 21.) The 4 Geo. 4. enacted, that if any person should *maliciously* assault any other person, with intent to rob *such other* person, he should be adjudged guilty of felony, &c. The enactment in the 7 & 8 Geo. 4. is substantially the same, being "shall assault any other person with intent to rob him."

Upon an indictment for an assault with intent to rob, the prosecutor must prove, 1, the assault; and 2, the intent of the prisoner to commit a robbery.

Proof of the assault.] The assault will be proved in the same manner as the assault in robbery, only that the completion of the offence, in taking the prosecutor's property from his person or in his presence will be wanting. A question has been raised upon the repealed statutes, whether or not there must be an actual assault upon the same person whom it is the offender's intention to rob. In the construction of the 7 Geo. 2. c. 21. it was decided that the assault must be upon the person intended to be robbed. The prosecutor was riding in a post-chaise, when it was stopped by the prisoner, who, extending his arm towards the post-boy, presented a pistol, swore many bitter oaths with great violence, but did not make any demand of money. He immediately stopped the chaise, when the prisoner turned towards it, but perceiving some one coming up, rode off without speaking. Upon an indictment for assaulting the prosecutor with intent to rob him, Ashhurst, J. told the jury that the evidence was not sufficient, that the charge was, not for an assault with intent to rob the postillion, but with an intent to rob the prosecutor in the chaise, and that no such intent appeared. *Thomas's case*, 1 *Leach*, 330, 1 *East*, *P. C.* 417.

Proof of the intent to rob.] The intent to rob will be gathered from the general conduct of the prisoner at the time. Menaces, threats, violence, and in short whatever conduct, which, if it had been followed by a taking of property, would have constituted robbery, will in this case be evidence of an intent to rob. The prisoners rushed out of the hedge upon the prosecutor, who was the driver of a return chaise, as he was passing along the road, and one of them, presenting a pistol to him, bade him stop, which the boy did, but called out for assistance to some persons whom he had met just before. On this one of the prisoners threatened to blow his brains out if he called out any more, which the prosecutor nevertheless continued to do, and, obtaining assistance, took the men, who had made no demand of money. They were convicted of an assault with intent to rob, and transported. *Trusty's case*, 1 *East*, *P. C.* 418.

It appears from one case to have been thought that in order to substantiate the fact of the intent to rob, a demand of property was necessary to be proved. *Parfait's case*, 1 *East*, *P. C.*

416. It seems, however, that this decision was founded upon an erroneous view of the then statute, two of the clauses, that respecting assaults to rob, and that respecting demanding money by threats and menaces being read as one enactment. 1 *East, P. C.* 417. *Thomas's case, Id.*, and *Trusty's case, Id.* 418, also tend to show that the resolution of the court in *Parfait's case* is erroneous, *see also Sharwin's case*, 1 *East, P. C.* 421. The words of the statute 7 & 8 G. 4. c. 29. s. 6, seem to leave no doubt upon the question, the words "with intent to rob" following immediately after the description of the offence by assaulting, and not being deferred, as in the stat. 7 G. 2. c. 21, until after the description of the offence of demanding, &c., with menaces.

SACRILEGE.

Statute 7 & 8 G. 4. *c.* 29. . . . 756
Proof that the building is a church or chapel . . 756
Proof of the stealing of goods . . . 757

Statute 7 & 8 *G.* 4. *c.* 29.] The statutes 23 Hen. 8. c. 1, and 1 Ed. 6. c. 12, which related to the offence of sacrilege, or breaking and stealing in a church, are repealed by the 7 & 8 G. 4. c. 27.

By 7 & 8 G. 4. c. 29. s. 10, if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

Upon a prosecution under this statute, the prosecutor must prove, 1, the breaking and entering; 2, that the building broken was a church or chapel within the statute; and, 3, the stealing of goods in the church or chapel.

Such a breaking and entering, as would constitute a burglary, will be a breaking and entering within this statute; but it need not be in the night-time. It should be observed, that a breaking and entering, merely *with intent to steal*, is not made an offence by the statute.

Proof that the building is a church or chapel.] It must appear that the building, in which the offence was committed,

was a church or chapel. Where the goods stolen had been deposited in the church-tower, which had a separate roof, but no outer door, the only way of going to it being through the body of the church, from which the tower was not separated by a door or partition of any kind; Parke, J., was of opinion that this tower was to be taken as part of the church. *Wheeler's case*, 3 *C. & P.* 585. This statute does not include the chapels of dissenters, *Richardson's case*, 6 *C. & P.* 335; and the practice is to indict, in such instances, for the larceny. *Hutchinson's case*, *Russ. & Ry.* 412. Where such chapels are intended to be comprised, they are specifically described, as in the 7 & 8 G. 4. c. 30. s. 2; against setting fire "to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered and recorded."

Proof of the stealing of goods.] The words in the 7 & 8 G. 4. c. 29. s. 10, "any chattels," must be held, like the words "any goods," in the repealed statute 1 Ed. 6. c. 12, to extend to articles deposited in a church, though not used for divine service. While a church was undergoing repair, the prisoner stole from it a pot, used to hold charcoal, for airing the vaults, and a snatch-block, used to raise weights, if the bells wanted repair. Upon a conviction for this offence, as sacrilege, under the statute of Ed. 6, the judges were of opinion that these goods were within the protection of the act, which was intended to prevent the violation of the sanctity of the place. *Rourke's case*, *Russ. & Ry.* 386. Upon the ground of the decision in the above case, and the very general nature of the words used in the new statute, it would probably be held, that the stealing of *any chattels* in the church, though deposited there by a private individual, would be larceny. *See* 2 *Deac. Dig. C. L.* 1156.

SHOP,

BREAKING AND ENTERING A SHOP, AND STEALING THEREIN.

By the 7 & 8 G. 4. c. 29. s. 15, it is enacted, that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable

to any of the punishments which the Court may award, as therein-before last mentioned. By the section referred to, (s. 14,) the punishment is transportation for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the Court shall so think fit, in addition to such imprisonment.

The prosecutor must prove a breaking and entering, in the same manner as upon an indictment for breaking and entering a dwelling-house, *ante*, *p.* 331; and he must then prove a larceny in the shop, and that the goods were the property of the person mentioned in the indictment. Probably the decisions, with regard to the goods being under the protection of the dwelling-house, (in prosecutions for breaking and entering a dwelling-house, and stealing therefrom, *ante*, *p.* 333,) would be held applicable to prosecutions for this offence.

SMUGGLING,

AND OTHER OFFENCES CONNECTED WITH THE CUSTOMS.

Proof of assembling armed to assist smuggling . 759
Proof of being assembled together . . . 759
Proof of being armed with offensive weapons . . 759
Proof of shooting at a vessel belonging to the navy, &c. . 760
Proof of being in company with others having prohibited goods 760
Service of indictment in certain cases, and entering plea for prisoners . . . 761
Certain rules of evidence . . . 761
Limitation of prosecutions . . . 762
Venue 763

The statutes against the offence of smuggling were consolidated by the 6 G. 4. c. 108, but other statutes having been subsequently passed, the whole were consolidated in the 3 & 4 W. 4. c. 53, which contains various regulations with regard to prosecutions by the customs in general.

Proof of assembling armed to assist in smuggling.] By the 58th sect. of the 3 & 4 W. 4. c. 53, it is enacted, that if any persons to the number of three or more, armed with fire-arms or other offensive weapons, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs or other officer authorised to seize the same, or from any person or persons employed by them, or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence, or in case any persons to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon.

On the part of the prosecution, the evidence will be—1, that the defendants to the number of three or more, were assembled together; 2, for the purpose of aiding and assisting; 3, that they or some of them (*see Smith's case, Russ. & Ry.* 386, *ante*,) were armed; 4, with offensive weapons.

Proof of being assembled together.] It must be proved that the prisoners, to the number of three or more, were assembled together, and as it seems, deliberately, for the purpose of aiding and assisting in the commission of the illegal act. Where a number of drunken men came from an ale-house, and hastily set themselves to carry away some Geneva, which had been seized, it was considered very doubtful whether the case came within the statute 19 G. 2. c. 34, the words of which manifestly allude to the circumstance of great multitudes of people coming down upon the beach of the sea, for the purpose of escorting uncustomed goods. *Hutchinson's case*, 1 *Leach*, 343.

Proof of being armed with offensive weapons.] Although it may be difficult to define what is to be called an offensive weapon; yet, it would be going too far to say, that nothing but guns, pistols, daggers, and instruments of war are to be so considered; bludgeons, properly so called, and clubs, and any thing not in common use for any other purpose than a weapon, being clearly offensive weapons within the meaning of the act. *Cosan's case*, 1 *Leach*, 342, 343, (*n.*) Large sticks, in one case, were held not to be offensive weapons; the preamble of

the statute, showing that they must be what the law calls dangerous. *Ince's case*, 1 *Leach*, 342, (*n.*) But on an indictment with intent to rob, a common walking stick, has been held to be an offensive weapon. *Johnson's case*, *Russ. & Ry.* 492, *vide ante*, p. 446. *See also Sharwin's case*, 1 *East*, *P. C.* 321. A whip was held not to be "an offensive weapon" within the statute 9 G. 2. c. 35, *Fletcher's case*, 1 *Leach*, 23, and, under the statute 6 G. 4. c. 138, *bats*, which are poles used by smugglers to carry tubs, were held not to be offensive weapons. *Noake's case*, 5 *C. & P.* 326. If in a sudden affray, a man snatch up a hatchet, this does not come within the statute. *Rose's case*, 1 *Leach*, 342, (*n.*)

Proof of shooting at a boat belonging to the navy, &c.] By section 59 of the 3 & 4 W. 4. it is enacted, that if any person shall maliciously shoot at any vessel or boat belonging to his Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and suffer death as a felon.

Upon an indictment under the first part of this section, the prosecutor must prove—1, the shooting; 2, the malice; 3, that the vessel shot at was belonging to the navy, or in the service of the revenue; 4, that the vessel was within 100 leagues of the coast.

Upon the statute 52 G. 3. c. 143, it was held that if a custom-house vessel chased a smuggler, and fired into her without hoisting such a pendant and ensign, as the statute 56 G. 3. st. 2. c. 104. s. 8, required, the returning the fire by the smuggler, was not malicious within the act. *Reynold's case*, *Russ. & Ry.* 465.

Proof of being in company with others having prohibited goods.] By the 60th section of the 3 & 4 W. 4. c. 53, it is enacted, that if any person being in company with more than four other persons be found with any goods liable to forfeiture, under this or any other act relating to the revenue of customs or excise, or in company with one other person, within five miles of the sea coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years.

Service of indictment in certain cases, and entering plea for prisoner.] By section 108, of the 3 & 4 W. 4. c. 53, the judges of the King's Bench, are empowered to issue warrants for apprehending offenders prosecuted by indictment or information, and such offenders neglecting to give bail, may be committed to gaol, and where any person, either by virtue of such warrant of commitment, or by virtue of any writ of *capias ad respondendum* issued out of the said court, is now detained or shall hereafter be committed to and detained in any gaol for want of bail, it shall be lawful for the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol wherein such person is or shall be so detained, with a notice thereon indorsed, that unless such person shall, within eight days from the time of such delivery of a copy of the indictment or information as aforesaid, cause an appearance and also a plea or demurrer to be entered in the said court to such indictment or information, an appearance and the plea of not guilty will be entered thereto in the name of such person; and in case he or she shall thereupon, for the space of eight days after the delivery of a copy of such indictment or information as aforesaid, neglect to cause an appearance and also a plea or demurrer to be entered in the said court to such indictment or information, it shall be lawful for the prosecutor of such indictment or information, upon affidavit being made and filed in the court of the delivery of a copy of such indictment, or information, with such notice indorsed thereon as aforesaid, to such person, or to such gaoler, keeper, turnkey, as the case may be, which affidavit may be made before any judge or commissioner of the said court authorised to take affidavits in the said court, to cause an appearance and the plea of not guilty to be entered in the said court to such indictment or information, for such person; and such proceedings shall be had thereupon as if the defendant in such indictment or information appeared and pleaded not guilty, according to the usual course of the said court; and that if upon trial of such indictment or information any defendant so committed and detained as aforesaid shall be acquitted of all the offences therein charged upon him or her, it shall be lawful for the judge before whom such trial shall be had, although he may not be one of the judges of the said court of King's Bench, to order that such defendant shall be forthwith discharged out of custody as to his or her commitment as aforesaid, and such defendant shall be thereupon discharged accordingly.

Certain rules of evidence.] The statute 3 & 4 W. 4. c. 53, creates various presumptions for the purpose of facilitating the evidence in proceedings instituted under it.

By section 116, it is enacted, that in case of any information

or proceedings had under this or any other act relating to the customs, the averment that the commissioners of his majesty's customs or excise have directed or elected such information or proceedings to be instituted, or that any vessel is foreign, or belonging wholly or in part to his majesty's subjects, or that any person detained or found on board any vessel or boat liable to seizure is or is not a subject of his majesty, or that any person detained is or is not a seafaring man, or fit and able to serve his majesty in his naval service, or that any person is an officer of the customs, and where the offence is committed in any port in the united kingdom, the naming of such port in any information or proceedings shall be sufficient, without proof as to such fact or facts, unless the defendant in such case shall prove to the contrary.

By section 117, it is enacted, that all persons employed for the prevention of smuggling under the direction of the commissioners of his majesty's customs, or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment, in any information or suit, that such party was so duly employed shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary.

And by section 118, it is enacted, that if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.

Limitation of prosecutions.] By 3 & 4 W. 4. c. 53. s. 120, it is enacted, that all suits, indictments, or informations exhibited for any offence against this or any other act relating to the customs in any of his majesty's courts of record at Westminster, or in Dublin, or in Edinburgh, or in the royal courts of Guernsey, Jersey, Alderney, Sark, or Man, shall and may be had, brought, sued, or exhibited within three years next after the date of the offence committed, and shall and may be exhibited before any one or more justices of the peace within six months next after the date of the offence committed.

All indictments under this act (except cases before justices,) are to be preferred by order of the commissioners.

Venue.] By statute 3 & 4 W. 4. c. 53. s. 77, it is enacted, that in case any offence shall be committed upon the high seas against this or any other act relating to the customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place on land in the United Kingdom or the Isle of Man into which the person committing such offence or incurring such penalty or forfeiture, shall be taken, brought, or carried, or in which such person shall be found; and in case such place on land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, borough, liberty, division, franchise, or town corporate, as any justice of the peace of the county within which such city, borough, liberty, division, franchise, or town corporate is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding: provided always, that where any offence shall be committed in any place upon the water not being within any county of the united kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this act, be deemed and taken to be an offence committed upon the high seas.

By section 122, any indictment or information for any offence against that act, or any act relating to the customs, shall be inquired of, examined, tried and determined in any county of England where the offence is committed in England, and in any county in Scotland where the offence is committed in Scotland, and in any county in Ireland where the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.

SODOMY.

By the statute 9 G. 4. c. 30. s. 15, it is enacted, that every person convicted of the abominable crime of buggery, committed either with mankind, or with any animal, shall suffer death as a felon.

The clause (sec. 18,) respecting the difficulty of proof with regard to the completion of the offence of rape, already stated, *ante, p.* 709, is applicable also to this crime, and the cases there cited, on the interpretation of that clause, are authorities here.

It is not necessary to prove that the offence was committed against the will of the party upon whom the assault is made, and if that party be consenting, both are guilty of the offence. In one case, a majority of the judges were of opinion, that the commission of the crime with a woman was indictable. *Wiseman's case, Fortescue,* 91. The act in a child's mouth does not constitute the offence. *Jacob's case, Russ. & Ry.* 331.

Proof that the prisoner was addicted to such practices is not admissible, *ante, p.* 58.

SPRING GUNS.

The setting of spring guns and man traps is made a misdemeanor by the statute 7 & 8 G. 4. c. 18, by the 1st section of which it is enacted, and declared, that if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

By section 3, of the same statute, it is enacted and declared, that if any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid.

But by section 4, it is provided and enacted, that nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of that act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set, or caused or

continued to be set in a dwelling house for the protection thereof.

And by section 2, it is also provided and enacted, that nothing therein contained shall extend to make it illegal to set any gin or trap, such as may have been or may be usually set with the intent of destroying vermin.

Upon a prosecution in this statute, the prosecutor must prove, 1st, the setting or causing to be set the engine in question; and 2d, the intent to destroy or inflict grievous bodily harm. It is not however necessary to show an actual intent, the words of the statute being, "or whereby the same may destroy or inflict," &c., therefore if the party sets the engine in such a place as that in reasonable probability it may inflict the injury, the offence seems complete.

If the indictment is for continuing the engine, evidence must be given that the defendant knew of its being set, and knowingly continued it.

THREATS.

DEMANDING MONEY WITH MENACES.

Statute 7 & 8 *Geo.* 4. *c.* 29. 765
Proof of the demand 765
Proof of the threat or force 766
Proof of the intent 766
Proof of the thing demanded 767

Statute 7 & 8 *Geo.* 4. *c.* 29.] The offence of demanding money with menaces is now provided against by statute 7 & 8 G. 4. c. 29. s. 6, by which it is enacted, that if any person shall, with menaces or by force, demand any such property (*viz.* any chattel, monney or vauable security) of any other person, with intent to steal the same the offender shall be punished as therein-mentioned.

Upon an indictment under this statute, the prosecutor must prove—1, the demand; 2, the menaces or force; 3, the intent to steal.

Proof of the demand.] There must be evidence that the prisoner demanded some chattel, money, or valuable security;

but it does not appear to be necessary that the demand should be made in words, if the conduct of the prisoner amount to a demand in fact. Where the prisoners seized the prosecutor, and one of them said, "Not a word, or I will blow your brains out," and the other repeated the words, and appeared to be searching for some offensive weapon in his pocket, when, upon the prosecutor seizing him, the other prisoner ran away without any thing more being said; on an objection that this was no *demand*, (within the repealed statute 7 Geo. 2. c. 21, which enacts, that if any person shall, by menaces or by any forcible or violent manner, *demand* any money, &c. with intent, &c.,) the Court said, that *an actual demand* was not necessary, and that this was a fact for the jury, under all the circumstances of the case. The case was afterwards disposed of on the form of the indictment. *Jackson's case*, 1 *Leach*, 267, 1 *East*, *P. C.* 419. *See* 5 *T. R.* 169.

In another case upon the same statute, but upon an indictment for an assault with intent to rob, Willes, C. J., made the following observations on the subject of a demand. The circumstances were that the prisoner did not make any demand, or offer to demand the prosecutor's money; but only held a pistol in his hand towards the prosecutor, who was a coachman, on his box; and, per Willes, C. J. a man who is dumb may make a demand of money, as if he stop a person on the highway, and put his hat or hand into the carriage, or the like; but in this case the prisoner only held a pistol to the coachman, and said to him nothing but "stop." That was no such demand of money, as the act requires. *Parfait's case*, 1 *East*, *P. C.* 416. Upon this Mr. East justly remarks, that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand to go to a jury. The unfortunate sufferer understands the language but too well; and why must courts of justice be supposed ignorant of that which common experience teaches to all men? 1 *East*, *P. C.* 417. 1 *Russell*, 619.

Proof of the threat or force.] The prosecutor must show that the demand was made with menaces, or by force. With regard to the menaces, they must be of the same nature, as if the money had been delivered in consequence of them, would have constituted the offence of robbery. *Vide supra.* In the same manner the *force* used must be such as would have been sufficient to render *the taking* a robbery.

Proof of the intent.] The intent, as in similar cases, will be proved from the circumstances under which the demand was made. The decisions upon the *animus furandi* in robbery, (*vide ante*, *p.* 736) may be referred to as governing the evidence in this case also.

Proof with regard to the thing demanded.] In order to bring the offence within the statute, the thing demanded must be such as the party menaced has the power of delivering up, or is supposed by the offender to have the power of delivering up. Where several persons were indicted for demanding with menaces the money of W. Gee, with intent to steal it, and it appeared that they had by duress extorted from him a check, (which he wrote on paper furnished by the prisoners,) upon a banker, for a large sum of money, the offence was held not to be within the statute. *Edwards's case, O. B.* 6 *C. & P.* 515. The prisoners were afterwards charged with demanding by menaces a valuable security for money, but the court held this offence likewise not within the statute, on the ground that the check never was in the peaceable possession of Mr. Gee. *Edwards's case. Id.* 521.

THREATENING LETTERS—DEMANDING MONEY.

Statute 7 *and* 8 *Geo.* 4 *c.* 29 . . . 767
Proof of the sending or delivering of the letter or writing 768
Proof of the nature of the letter or writing the demand 770
Proof of the thing demanded 771

Statute 7 *&* 8 *Geo.* 4. *c.* 27.] The offence of demanding money by a threatening letter was provided against by the statute 9 Geo. 1. c. 22. s. 1., which enacted, that if any person or persons should knowingly send any letter without any name subscribed, or with a fictitious name, demanding money, venison, or other valuable thing, he should be guilty of felony without benefit of clergy. This enactment was extended by 27 Geo. 2. c. 15, to threats to kill, or murder, or to burn houses, &c., and by 30 Geo. 2. c. 24, to threats to accuse of any crime punishable with death, transportation, pillory, or other infamous punishments. There were several important differences in the defining of the different offences created by these statutes, which it is not now necessary to specify. *See* 2 *Russell*, 579, (*n.*) These statutes were repealed by the 4 Geo. 4. c. 54. s. 3, and their provisions re-enacted, and the latter statute is also repealed by the

7 & 8 Geo. 4. c. 27, except so far as relates to any person who shall send or deliver any letter or writing, threatening to kill or murder, or to burn, or destroy, as therein mentioned, or shall be accessory to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence.

And now by stat. 7 & 8 Geo. 4. c. 29. s. 8, it is enacted, that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or with any attempt or endeavour to commit any rape, or of any infamous crime as thereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of felony, and be liable to be transported for life, &c.

Section 9, defines what shall be an infamous crime, *viz.* buggery, committed either with mankind or with beast, and every assault with intent to commit that crime, and every intent or endeavour to commit that crime, and every solicitation, persuasion, promise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit such crime.

Upon a prosecution under the first branch of this clause, *viz.* the knowingly sending or delivering any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, the prosecutor must prove, 1, the knowingly sending or delivering of the letter by the prisoner, 2, the nature of the letter or writing, and that it contains a demand, with menaces, and without any reasonable or probable cause, and 3, that the demand is of some chattel, money, or valuable security.

Proof of the sending or delivering of the letter or writing.] The sending or delivering of the letter need not be immediately by the prisoner to the prosecutor, if it be proved to be sent or delivered by his means and directions, it is sufficient. Upon an indictment on the repealed statute 27 Geo. 2. c. 15, for sending a threatening letter to William Kirby, it appeared that the threats were, in fact, directed against two persons, named Rodwell and Brock. Kirby received the letter by the post. The judges held that as Kirby was not threatened, the judgment must be arrested, but they intimated that if Kirby had delivered the letter to

Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. *Paddle's case, Russ. & Ry.* 484. Where the prisoner dropped the letter upon the steps of the prosecutor's house, and ran away, Abbot, C. J., left it to the jury to say, whether they thought the prisoner carried the letter and dropped it, meaning that it should be conveyed to the prosecutor, and that he should be made acquainted with its contents, directing them to find him guilty if they were of opinion in the affirmative. *Wagstaff's case, Russ. & Ry.* 398. So in a case upon the 9 Geo. 1. c. 22, for sending a letter demanding money. Yates, J., observed, that it seemed to be very immaterial, whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance by which it might finally come to his hands. The fact was, that the prisoner dropped the letter into a vestry room which the prosecutor frequented every Sunday morning before the service began, where the sexton had picked it up, and delivered it to him. *Lloyd's case, 2 East, P. C.* 1122. In a note upon this case, Mr. East says *quære*, whether if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who it is expected will forward it to such party, this may not be said to be a *sending* to such party? The same evidence was given in *Springett's case*, (*2 East, P. C.* 1115,) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was taken on that ground, *2 East, P. C.* 1123, (*n.*) So where the evidence was that the letter was in the handwriting of the prisoner, who had sent it to the post-office, whence it was delivered in the usual manner; no objection was made. *Heming's case, 2 East, P. C.* 1116.

It must appear that the prisoner sent or delivered the letter in question, knowing it to be such a letter as is described in the statute. In a case upon the 27 Geo. 2. c. 15, the evidence was, that the prisoner delivered the letter at the gate of Newgate, to a person who was employed in doing errands for the prisoners; that this person immediately carried it to the penny post-office, whence it was regularly conveyed, as directed, to the prosecutor, but there was no proof of the prisoner's handwriting, or that he was acquainted with the contents. Hotham, B, left it to the jury to say whether, from the fact of the prisoner having delivered the letter as before mentioned, he knew of the contents, and the jury having found the prisoner guilty, the judges held the conviction right. *Girdwood's case, 1 Leach,* 142. *2 East, P. C.* 1120.

Proof of the nature of the letter or writing.] It must be proved that the letter or writing was one demanding of some person with menaces, and without any reasonable or probable cause, some chattel, &c.

The act mentions letter or writing in general, and does not specify whether it shall or shall not have a signature, or a fictitious signature, or initials, and the questions, therefore, which arose upon the 9 Geo. 1. c. 22, respecting the mode of signature (*See Robinson's case*, 2 *Leach*, 749, 2 *East*, P. C. 1110,) have become immaterial. Nor need the document have the form of a letter; any *writing* containing a threat of the nature mentioned in the statute, is within the section.

Proof of the nature of the letter or writing—the demand.] The letter must contain a *demand* with menaces, and without any reasonable or probable cause. Whether the demand is such as is laid in the indictment is a question for the jury. *Girdwood's case*, 1 *Leach*, 142. 2 *East*, P. C. 1121. The demand need not be made in express words; it is sufficient if it appear from the whole tenor of the prisoner's letter. *See the cases cited infra.* That the demand was made with menaces, and without any reasonable or probable cause, will also appear in the same manner; but should any doubt exist upon the latter point, the prosecutor should be called to give some evidence of the want of reasonable and probable cause.

A mere request, such as asking charity, without imposing any conditions, does not come within the sense or meaning of the word "demand." *Robinson's case*, 2 *Leach*, 749, 2 *East*, P. C. 1110.

The prisoner was indicted for sending a letter to the prosecutor demanding money, with menaces. The letter was as follows:

"Sir, as you are a gentleman and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed to take from you personally a sum of money, or injure your property. I mean to say your building property. In the manner they have planned, this dreadful undertaking would be a most serious loss. They have agreed, &c. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. T.'s garden gate, I will leave a letter in the place to inform you when this is to take place. I hope you won't attempt to séize me, when I come to take up the money and leave the note of information. Sir, you will find I am doing you a most serious favour, &c. &c." Bolland, B., doubted whether

this letter contained either a *menace*, or a *demand*, and reserved the point for the opinion of the judges, who held that the conviction was wrong. *Pickford's case*, 4 *C. & P.* 227.

Proof of the thing demanded.] It must appear that the thing demanded by the letter or writing was a chattel, money, or some valuable security. Where the indictment charged, that the prisoner intending to extort *money*, sent a threatening letter, and it appeared that it was for the purpose of extorting a promissory note, it was held that the evidence did not support the indictment. *Major's case*, 2 *Leach*, 772, 2 *East*, *P. C.* 1118. *And see Edwards's case*, 6 *C. & P.* 515, *ante*, *p.* 767.

THREATS.

ACCUSING OF MURDER, &c.

Statute 4 *Geo.* 4. *c.* 54. 771
Proof of the sending of the letter, &c. . . 772
Proof that the letter was one threatening to kill or murder 772

Statute 4 *Geo.* 4. *c.* 54.] That portion of the statute 4 Geo. 4. c. 54, which relates to threats to kill or murder, or to burn or destroy, is excepted from the repealing statute of 7 & 8 Geo. 4. c. 27. *vide ante*, *p.* 768.

By 4 Geo. 4. c. 54. s. 3. it is enacted, that if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of grain, hay or straw, or shall procure, counsel, aid, or abet the commission of the said offences, or any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any of the said offences, every person so offending shall, upon being thereof lawfully convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the

seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, for any term not exceeding seven years.

In a prosecution under this act, the prosecutor must prove, 1, the knowingly and wilfully sending or delivering a letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature; and 2, that it was a letter threatening to kill or murder, &c. No view or intent to extort money is required to constitute the offence by this act.

Proof of the sending or delivering of the letter, &c.] The sending or delivering will be proved in the manner before mentioned, with regard to other threatening letters. *Vide ante, p. 768.*

Proof that the letter was one threatening to kill or murder, &c.] Whether or not the letter amounts to a threat to kill or murder, &c. within the words of the statute, is a question for the jury. The prisoner was indicted (under the 27 G. 2. c. 15.) for sending a letter to the prosecutor, threatening to kill or murder him. The letter was as follows:—

"Sir—I am sorry to find a gentleman like you would be guilty of taking M'Allester's life away for the sake of two or three guineas, but it will not be forgot by one who is but just come home to revenge his cause. This you may depend upon; whenever I meet you I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from M'Allester, before he died, for to seek revenge, I am come to town.—I remain a true friend to M'Allester, "J. W."

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner, if they thought the words might import any thing less than to kill or murder. The jury having found the prisoner guilty, on a case reserved, the judges were of opinion that the conviction was right. *Girdwood's case*, 1 *Leach*, 142. 2 *East, P. C.* 1121.

The prisoners were indicted on the 27 Geo. 2. c. 15. for sending to the prosecutor the following letter:—

"Sir—I am very sorry to acquaint you, that we are determined to set your mill on fire, and likewise to do all the public injury we are able to do you, in all your farms and seteres [lettings] which you are in possession of, without you on next —— day, release that Ann Wood which you put in confinement. Sir, we mention in a few lines, and we hope if you have any regard for your wife and family,

you will take our meaning without any thing further; and if you do not, we will persist as far as we possibly can; so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines, a fact, with our respect. So no more at this time from me, " R. R."

It was proved that this was in the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the prosecutor's yard, whence it was taken by a servant, and delivered to the prosecutor. The prosecutor swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; that he held a farm when the letter was written and came to his hands, with several buildings upon it. On a case reserved, it was agreed by the judges, that as the prosecutor had no such property at the time, as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest Lord Kenyon, C. J., and Buller, J., were of opinion, that the letter must be understood as also importing a threat to burn the prosecutor's farm-house and buildings, but the other judges, not thinking that a necessary construction, the conviction was held wrong, and a pardon recommended. *Jepson and Springett's case*, 2 *East*, *P. C.* 1115.

ACCUSING OF INFAMOUS CRIMES.

Statute 7 & 8 *Geo.* 4. *c.* 29. . . . 773
Proof of the accusing or threatening to accuse . . 774
Proof of the nature of the accusation . . . 774
Proof of the view or intent to extort money . . 775
Proof of the thing intended to be extorted . . 775

Statute 7 & 8 *Geo.* 4. *c.* 29.] By the 7 & 8 Geo. 4. c. 29. s. 8. it is enacted, if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing, or threatening to accuse, any person of any crime punishable by law with death, transportation, or pillory, or with any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as thereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of felony.

On a prosecution upon this statute, the prosecutor must prove, 1, the accusing or threatening to accuse, or the knowingly sending or delivering of the letter or writing accusing or threatening to accuse; 2, that the accusation is of the nature specified in the statute; 3, the view or intent to extort or gain; 4, that the matter intended to be extorted or gained was some chattel, money, or valuable security.

Proof of the accusing or threatening to accuse, &c.] The accusation under this statute may either be by word of mouth or in writing, and an actual accusation before a competent authority or otherwise, or a mere threat to make such an accusation, will be sufficient. But if the party has been already accused, threatening to procure witnesses to support that accusation, is not within the statute. "It is one thing to accuse, and another to procure witnesses to support a charge already made; this is at most a threat to support it by evidence." *Per Bayley, J. Gill's case, York Sum. Ass.* 1829, *Greenwood's Stat.* 191, (*n.*) *Lewin, C. C.* 305. An indictment upon the 4 G. 4. c. 54. s. 5, (which uses the words "threaten to accuse,") charged the prisoners with "charging and accusing J. N., and with menacing and threatening to prosecute J. N." Upon an objection taken, that the indictment had not pursued the statute, Garrow, B., (after consulting Burrough, J.) was of that opinion. If, he said, the indictment had followed the statute, and it had been proved that the prisoners threatened to *prosecute* J. N., I should have left it to the jury to say whether that was not a threatening to accuse him. *Abgood's case*, 2 *C. & P.* 436.

If the accusation or threat to accuse was contained in a letter or writing, the knowingly sending or delivering of such letter or writing must be proved in the manner already pointed out. *Vide ante, p.* 768.

Proof of the nature of the accusation.] It must be shown that the accusation, made or threatened, was of the nature of those specified in the statute. Where the meaning is ambiguous, it is for the jury to say whether it amounts to the accusation or threat imputed. Declarations subsequently made by the prisoner are also admissible, to explain the meaning of a threatening letter. The prisoner was indicted for sending a letter, threatening to accuse the prosecutor of an infamous crime. The prosecutor meeting the prisoner, asked him what he meant by sending him that letter, and what he meant by "*transactions five nights following*," (a passage in the letter). The prisoner said that the prosecutor knew what he meant. The prosecutor denied it, and the prisoner afterwards said, "I mean by taking

indecent liberties with my person." This evidence having been received, and the point having been reserved for the opinion of the judges, they unanimously resolved that the evidence had been rightly received. *Tucker's case*, 1 *Moody, C. C.* 134.

Proof of the view or intent to extort money.] It must appear that the accusation or threat was made, or the letter or writing sent or delivered, with the view or intent to extort or gain from some person some chattel, &c. If the accusation or threat were merely made in passion, and with no view of gain, it would not be within the statute.

Proof of the thing intended to be extorted, &c.] The matter intended to be gained or extorted must be some chattel, money, or valuable security, and it must be proved as laid in the indictment.

TRANSPORTATION—RETURNING FROM.

By stat. 5 Geo. 4. c. 84. s. 22. it is enacted, that if any offender who shall have been, or shall be so sentenced or ordered to be transported or banished, or who shall have agreed, or shall agree, to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender, so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing, or in attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff, or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be con-

veyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of 20*l.* for every such offender so convicted.

By s. 24, it is enacted, that the clerk of the court, or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall at the request of any person, on his majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment, (not taking for the same more than 6*s.* 8*d.*) which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof.

Upon a prosecution for this offence, the prosecutor must prove, 1, the conviction of the offender, by producing a certificate according to the above section of the statute; 2, the sentence or order of transportation, in like manner. The signature and official character of the person signing the certificate must be proved. If the certificate is made by the clerk or officer of a court out of Great Britain, it is admissible when verified by the seal of the court or the signature of the judge. The "effect and substance" of the former conviction must be stated in the certificate; merely stating that the prisoner was convicted "of felony" is not sufficient. *Sutcliffe's case, Russ. & Ry.* 469. (*n.*) *Watson's case, Id.* 468. 3, Proof must then be given of the prisoner's identity; and 4, that he was at large before the expiration of his term.

Punishment.]—By stat. 4 & 5 W. 4. c. 67. repealing 5 G. 4. c. 84. it is enacted, that from and after the passing of that act, every person convicted of any offence above specified in the said act of the 5th year of the reign of his late majesty king George IV. or of aiding or abetting, counsel-

ling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.

GENERAL MATTERS OF DEFENCE.

There are certain general matters of defence, the evidence with regard to which it will be convenient to comprise under the three following heads:—Infancy, Insanity, and Coercion by Husbands.

INFANCY.

Infancy 777
In case of misdemeanors and offences not capital 777
In cases of capital offences . . . 778
Insanity 778
Cases in which the prisoner has been held not insane 779
Cases in which the prisoner has been held insane . 782
Cases of insanity caused by intoxication . . 784
Coercion by husband 785

An infant is, in certain cases, and under a certain age, privileged from punishment, by reason of a presumed want of criminal design.

In cases of misdemeanors and offences not capital.] In certain misdemeanors an infant is privileged under the age of 21, as in cases of *non-feasance* only, for laches shall not be imputed to him. 1 *Hale, P. C.* 20. But he is liable for misdemeanors accompanied with force and violence, as a riot or battery. *Id.* So for perjury. *Sid.* 253. So he may be convicted of a forcible entry, 4 *Bac. Ab.* 591; but must not be fined, *ante, p.* 379.

In cases of capital offences.] Under the age of seven years, an infant cannot be punished for a capital offence, not having a mind *doli capax*; 1 *Hale, P. C.* 19.; nor for any other

felony, for the same reason. *Id.* 27. But on attaining the age of fourteen, he is obnoxious to capital (and of course to any minor) punishment, for offences committed by him at any time after that age. 1 *Hale, P. C.* 25.

With regard to the responsibility of infants, between the ages of seven and fourteen, a good deal of doubt formerly prevailed, but it is now quite clear, that where the circumstances of the case show that the offender was capable of distinguishing between right and wrong, and that he acted with malice, and an evil intention, he may be convicted even of a capital offence; and accordingly there are many cases, several of them very early ones, in which infants, under the age of fourteen, have been convicted and executed. Thus in 1629, an infant between eight and nine years of age was convicted of burning two barns in the town of Windsor, and it appearing that he had malice, revenge, craft, and cunning, he was executed. *Dean's case*, 1 *Hale, P. C.* 25. (*n.*)

So Lord Hale mentions two instances to the same effect, one of a girl of thirteen, executed for killing her mistress, and another of a boy of ten, for the murder of his companion. 1 *Hale, P. C.* 26. *Fitz. Ab. Corone*, 118. In the year 1748, a boy of ten years of age was convicted of murder, and the judges, on a reference to them, were unanimously of opinion that the conviction was right. *York's case, Foster*, 70. An infant under the age of fourteen years is presumed by law unable to commit a rape, and though in other felonies, *malitia supplet ætatem*, yet as to this fact, the law presumes the want of ability, as well as the want of discretion. But he may be a principal in the second degree, as aiding and assisting, though under fourteen years, if it appear that he had a mischievous discretion. 1 *Hale, P. C.* 630. *Eldershaw's case*, 3 *C. & P.* 396.

It is necessary, says Lord Hale, speaking of convictions of infants between the years of seven and twelve, that very strong and pregnant evidence should be given, to convict one of that age. 1 *Hale, P. C.* 27. 4 *Bl. Com.* 23. And he recommends a respiting of judgment till the king's pleasure be known. *Ibid.*

INSANITY.

Cases in which the prisoner has been held not to be insane 779
Cases in which the prisoner has been held to be insane 782
Casee of insanity, caused by intoxication . . 784

The defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been

laid down by the judges, with regard to the nature and degree of aberration of mind which will excuse a person from punishment, are by no means consistent with each other, or as it should seem, with correct principle. That principle appears to be well laid down in the following passage.

To amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts. *Alison's Princ. Crim. Law Scotl.* 645, 654.

The *onus* of proving the defence of insanity, or in the case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner. *See Alison's Princ. Cr. Law of Scotl.* 659.

For the purpose of proving insanity, the opinion of a person possessing medical skill is admissible. *Wright's case, Russ. & Ry.* 456, *ante, p.* 137.

The disposal of persons found to be insane at the time of the offence committed, is regulated by the statute 39 & 40 Geo. 3. c. 94, *ante, p.* 175.

The mode of arraignment and trial of such persons has also been stated, *ante, p.* 175.

Cases in which the prisoner has been held not to be insane.] In the following cases, the defence of insanity was set up, but without effect, and the prisoners were convicted. The prisoner was indicted for shooting at Lord Onslow. It appeared that he was to a certain extent deranged, and had misconceived the conduct of Lord Onslow, but he had formed a regular design to shoot him, and prepared the means of effecting it. Tracy, J., observed, that the defence of insanity must be clearly made out; that it is not every idle or frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as to exempt him from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. *Arnold's case, Collinson on Lunacy*, 475, 16 *How. St. Tr.* 764, 765. The doctrine of the learned judge in this case, may, perhaps, be thought to be carried too far, for if the prisoner, in committing the act, is deprived of the power of distinguishing between right and wrong with relation to

that act, it does not appear to be necessary that he should not know what he is doing. *Vide post.*

Lord Ferrers was tried before the House of Lords for the murder of his steward. It was proved that he was occasionally insane, and fancied his steward to be in the interest of certain supposed enemies. The steward being in the parlour with him, he ordered him to go down on his knees, and shot him with a pistol, and then directed his servants to put him to bed. He afterwards sent for a surgeon, but declared he was not sorry, and that it was a premeditated act; and he would have dragged the steward out of bed, had he not confessed himself a villain. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. It was contended for the prosecution, that the complete possession of reason was not necessary in order to render a man answerable for his acts; it was sufficient if he could discriminate between good and evil. The peers unanimously found his lordship guilty. *Earl Ferrers's case*, 19 *How. St. Tr.* 886.

The prisoner was indicted for shooting at and wounding W. B., and the defence was insanity, arising from epilepsy. He had been attacked with a fit on the 9th July, 1811; and was brought home apparently lifeless. A great alteration had been produced in his conduct, and it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, said that in insanity caused by epilepsy, the patient often imbibed violent antipathies against his dearest friends, for causes wholly imaginary, which no persuasion could remove, though rational on other topics. He had no doubt of the insanity of the prisoner. A commission of lunacy was produced, dated 17th June, 1812, with a finding that the prisoner had been insane from the 30th March. [The date of the offence committed does not appear in the report.] Le Blanc, J., concluded his summing up, by observing, that it was for the jury to determine whether the prisoner, when he committed the offence with which he stood charged, was capable of distinguishing between right and wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act which he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law. The jury, after consider-.

able deliberation, pronounced the prisoner guilty. *Bowler's case, Collinson on Lunacy*, 673, (*n.*)

The prisoner was indicted for adhering to the king's enemies. His defence was insanity. He had been accounted from a child a person of weak intellect, so that it surprised many that he had been accepted as a soldier. Considerable deliberation and reason, however, were displayed by him in entering the French service, and he stated to a comrade that it was much more agreeable to be at liberty, and have plenty of money, than to remain confined in a dungeon. The attorney-general in reply, said, that before the defence could have any weight in rebutting a charge so clearly made out, the jury must be satisfied that at the time the offence was committed, the prisoner did not really know right from wrong. He was convicted. *Parker's case, Collinson on Lunacy*, 477.

The direction of Mansfield, C. J., to the jury in *Bellingham's case*, seems not altogether in accordance with the correct rules on the subject of a prisoner's insanity. He said that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact, it must be proved beyond all doubt, that at the time he committed the act *he did not consider that murder was a crime against the laws of God and nature*, and that there was no other proof of insanity which would excuse murder or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be answerable to justice, and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such person be capable *in other respects*, of distinguishing between right and wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. The prisoner was found guilty and executed. *Bellingham's case*, 1 *Collinson on Lunacy*, 636. *Shelford on Lunatics*, 462. *See Offord's case*, 5 *C. & P.* 168. The above direction does not appear to make a sufficient allowance for the incapacity of judging between right and wrong *upon the very matter in question*, as in all cases of *monomania*. The following observations of an eminent writer on the criminal law of Scotland, are applicable to the subject. Although a prisoner understands perfectly the distinction between right and wrong, yet if he labours, as is generally the case, under an illusion and deception in

his own particular case, and is thereby incapable of applying it correctly to his own conduct, he is in that state of mental aberration which renders him not criminally answerable for his actions. For example; a mad person may be perfectly aware that murder is a crime, and will admit that, if pressed on the subject; still he may conceive that a homicide he has committed was nowise blameable, because the deceased had engaged in a conspiracy, with others, against his own life, or was his mortal enemy, who had wounded him in his dearest interests, or was the devil incarnate, whom it was the duty of every good Christian to meet with weapons of carnal warfare. *Alison's Princ. Crim. Law Scotl.* 645, *citing* 1 *Hume*, 37, 38. And see the observations on *Bellingham's case*, *Alison*, 658.

It has been justly observed that the plea of insanity must be received with much more diffidence in cases proceeding from the desire of gain, as theft, swindling, or forgery, which generally require some art and skill for their completion, and argue a sense of the advantage of acquiring other people's property. On a charge of horse stealing, it was alleged that the prisoner was insane, but as it appeared that he had stolen the horse in the night, conducted himself prudently in the adventure, and ridden straight by an unfrequented road to a distance, sold it, and taken a bill for the price, the defence was overruled. *Henderson's case*, *Alison's Princ. Cr. Law Scotl.* 655, 656.

Cases in which the prisoner has been held to be insane.] James Hadfield was tried in the Court of K. B. in the year 1800, on an indictment for high treason, in shooting at the king in Drury-lane theatre, and the defence made for the prisoner was, insanity. It was proved that he had been a private soldier in a dragoon regiment, and, in the year 1793, received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 14th May preceding the commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out

of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed-post, and that God had ordered him to do so; and, upon his wife screaming and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly the Duke of York. He then went to his master's workship, whence he returned to dinner at two, but said that he stood in no need of meat and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that, at the moment when the audience rose, on his Majesty's entering his box, he got up above the rest, and, presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; that, when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra, in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions he said that he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly, and without any apparent derangement; and, with equal calmness, repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend any thing against the life of the king, he knew the attempt only would answer his purpose.

The counsel for the prisoner put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for the jury to be satisfied that the act in question was the immediate unqualified offspring of the disease. Lord Kenyon, C. J., held, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim, and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed,

yet, there being no reason for believing the prisoner to have been at that period a rational and accountable being, he ought to be acquitted, and was acquitted accordingly. *Hadfield's case, Collinson on Lunacy*, 480, 1 *Russell*, 11.

The prisoner was indicted for setting fire to the cathedral church of York. The defence was that he was insane. It was proved that he was much under the influence of dreams, and in court he gave an incoherent account of a dream that had induced him to commit the act, a voice commanding him to destroy the cathedral on account of the misconduct of the clergy. Several medical witnesses stated their opinions that he was insane, and that, when labouring under his delusion, he could not distinguish right from wrong. One surgeon said that such persons, though incapable on a particular subject of distinguishing right from wrong, seek to avoid the danger consequent upon their actions, and that they frequently run away and display great cunning in escaping punishment. The jury acquitted the prisoner on the ground of insanity. *Martin's case, Shelford on Lunacy*, 465, *Annual Register, vol.* 71, *p.* 301.

Cases of insanity caused by intoxication.] Intoxication is no excuse for the commission of crime. The prisoner, after a paroxysm of drunkenness, rose in the middle of the night, and cut the throats of his father and mother, ravished the servant-maid in her sleep, and afterwards murdered her. Notwithstanding the fact of his drunkenness he was tried and executed for these offences. *Dey's case*, 3 *Paris & Fonbl. M. J.* 140. (*n.*) There are many men, it is said, in an able work on Medical Jurisprudence, soldiers who have been severely wounded in the head, especially, who well know that excess makes them mad; but if such persons wilfully deprive themselves of reason, they ought not to be excused one crime by the voluntary perpetration of another. 3 *Paris & Fonbl. M. J.* 140. But if, by the long practice of intoxication, an habitual or fixed insanity is caused, although this madness was contracted voluntarily, yet the party is in the same situation with regard to crimes, as if it had been contracted involuntarily at first, and is not punishable. 1 *Hale, P. C.* 32. And though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the question is, whether an act is premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration. *Per Holroyd, J., Grindley's case*, 1 *Russell*, 8.

COERCION BY HUSBAND.

In certain cases a married woman is privileged from punishment upon the ground of the actual or presumed command and coercion of her husband compelling her to the commission of the offence. But this is only a presumption of law, and if it appears, upon the evidence, that she did not in fact commit the offence under compulsion, but was herself a principal actor and inciter in it, she must be found guilty. 1 *Hale, P. C.* 516. In one case it appears to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. *Dicks's case*, 1 *Russell*, 16. Upon an indictment against a man and his wife for putting off forged notes, where it appeared that they went together to a public-house to meet the person to whom the notes were to be put off, and that the woman had some of them in her pocket, she was held entitled to an acquittal. *Atkinson's case*, 1 *Russell*, 20.

Evidence of reputation and cohabitation is in these cases sufficient evidence of marriage. *Ibid.* But where the woman is not described in the indictment as the wife of the man, the *onus* of proving that she is so, rests upon her. *Jones's case, Kel.* 37, 1 *Russell*, 20.

The presumption of coercion on the part of the husband does not arise unless it appear that he was present at the time of the offence committed. 1 *Hale, P. C.* 45. Thus, where a wife by her husband's order and procurement, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money, all the judges held that the presumption of coercion at the time of uttering did not arise, and that the wife was properly convicted of uttering, and the husband of procuring. *Morris's case, Russ. & Ry.* 270.

The prisoner, Martha Hughes, was indicted for forging and uttering Bank of England notes. The witness stated that he went to the shop of the prisoner's husband, where she took him into an inner room, and sold him the notes; that while he was putting them into his pocket the husband put his head in and said, "Get on with you." On returning to the shop he saw the husband, who, as well as the wife, desired him to be careful. It was objected, that the offence was committed under coercion, but Thompson, B., thought otherwise. He said, the law out of tenderness to the wife, if a felony be committed in the presence of her

husband, raises a presumption, *primâ facie*, and *primâ facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion, but it is absolutely necessary in such case that the husband should be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is, indeed, in consequence of a previous communication with the husband that the witness applies to the wife, but she is ready to deal, and has on her person, the articles which she delivers to the witness. There was a putting off before the husband came, and it is sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done; but when the crime has been completed in his absence, no subsequent act of his (though it might possibly make him an accessory to the felony of the wife), can be referred to what was done in his absence. *Hughes's case*, 1 *Russell*, 18. But where, on an indictment against a woman for uttering counterfeit coin, it appeared, that the husband accompanied her each time to the door of the shop, but did not go in, Bayley, J., thought it a case of coercion. *Anon. Math. Dig. C. L.* 262.

Where husband and wife were convicted on a joint indictment for receiving stolen goods, it was held that the conviction of the wife was bad, it not having been left to the jury to say whether she received the goods in the absence of her husband. *Archer's case*, 1 *Moody, C. C.* 143, *ante, p.* 719.

There are various crimes, from the punishment of which the wife shall not be privileged on the ground of coercion, such as those which are *mala in se*, as treason and murder. 1 *Hale, P. C.* 44, 45. And in offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, the rule with regard to coercion does not exist, as upon an indictment for keeping a disorderly house, *Hawk. P. C. b.* 1. *c.* 1. *s.* 12., *ante, p.* 644., or gaming house. *Dixon's case*, 10 *Mod.* 336. And the prevailing opinion is said to be that the wife may be found guilty with the husband in all misdemeanors, *Arch. C. L.* 17, 4*th ed.* 4 *Bl. Com. by Ryland*, 29. (*n.*) *Ingram's case*, 1 *Salk.* 384.

Where the wife is to be considered as merely the servant of her husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Thus, where the husband and wife were indicted for the murder of an apprentice of the husband, who had died for want of proper nourishment, Lawrence, J. held that the wife could not be convicted, for, though equally guilty, *in foro conscientiæ*, yet, in point of law, she could not be guilty of not providing the apprentice with sufficient food. *Squire's case*, 1 *Russell*, 16.

A woman cannot be indicted as an accessory by rescuing her husband. 1 *Hale, P. C.* 47. Nor can she be guilty of larceny in stealing her husband's goods. 1 *Hale, P. C.* 514, *ante, p.* 476. But if she and a stranger steal the goods the stranger is liable. *Tolfree's case,* 1 *Moody, C. C.*243, *ante, p.* 477. Nor is she guilty of arson within the 7 & 8 Geo. 4. c. 30. s. 2. by setting her husband's house on fire. *March's case,* 1 *Moody, C. C.* 182.

ADDENDA.

Page 48. *Examinations — mode of proof.*] Several cases respecting the mode of proving examinations have occurred since this work went to press. In one case, Patteson, J. on the authority of 2 *Hale, P. C.* 284, though contrary to his own opinion, refused to admit the examination, because neither the magistrate nor his clerk was called to prove it. *Richards's case*, 1 *Moody & Rob.* 396. (*n.*) In a subsequent case, where the examination had the signature of an attesting witness, who was called to prove it; Vaughan, J., and Patteson, J., at the Central Criminal Court, admitted it. Patteson, J. observing, that he was by no means satisfied, that it was in any case necessary to call either the magistrate or his clerk. *Hope's case*, 1 *Moody & Rob.* 396. (*n.*) In a case before Denman, C. J., it was proposed to prove an examination, signed with the prisoner's mark, by calling a person who was present when it was taken, but his lordship refused to receive this evidence, unless it were proved by the magistrate or his clerk; he observed, that the necessity of proving the deposition in this manner had been doubted, but the distinction appeared to him to be, that where the examination of a prisoner before a magistrate is taken down in writing, and signed with the prisoner's name, it need not be proved by the magistrate or his clerk; but if not signed by him, or if his mark only be attached to it, it is necessary to be proved by the magistrate or the clerk. For if the prisoner signs his name, this implies that he can read, and has read the examination, and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read, or that he knows the contents, and no person can swear that the examination has been correctly read over to him, except the person who read it.

Page 99. *Witnesses—Quakers and Moravians.*] By statute 3 & 4 W. 4. c. 49, Quakers and Moravians are permitted to make an affirmation or declaration instead of taking an oath, "in all places, and for all purposes whatsoever, where an oath is or shall be required, either by the common law, or by any act of parliament," and any such affirmation or declaration, if false, is punishable as perjury.

Page 221. *Bankrupt — evidence of the bankruptcy.*] So upon an indictment against a bankrupt, and others, for a conspiracy to conceal the bankrupt's effects, it was held not sufficient merely to aver that the trader became a bankrupt, but that the trading petitioning creditor's debt, and the other averments of matters necessary to constitute the offence ought to have been set forth. *Jones's case*, 4 *B. & Ad.* 345, 1 *N. & M.* 78.

Page 491. *Larceny.*] The following cases, relating to what is called *ring dropping*, were accidentally omitted in their proper place.

The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to share the value of it with the prosecutor, if he would deposit some money and his watch as a security. The prosecutor having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to larceny. *Patch's case*, 1 *Leach*, 238, 2 *East*, *P. C.* 678. So where under similar circumstances the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him, this also was held to be larceny. *Moore's case*, 1 *Leach*, 314, 2 *East*, *P. C.* 679. To the same effect is *Watson's case*, 2 *Leach*, 640, 2 *East*, *P. C.* 680. In all these cases it will be observed, that the prosecutor had no intention of parting with the property in the money, &c. stolen, but either that it was taken while the transaction was proceeding, as in *Patch's case*, without his knowledge, or was delivered under a promise that it should be restored, as in *Moore's case*.

Page 650. *Shooting at with intent, &c.*] Where the prisoner by snapping a percussion cap discharged a gun-barrel, detached from the stock, this was held "a shooting at" with "loaded arms," within the 9 G. 4. c. 31. *Coates's case*, 6 *C. & P.* 394.

INDEX.

ABDUCTION,
at common law, 193.
by statute, 194.
proof of the taking away, or detaining against the will, *id.*
proof of the woman's interest, 195.
proof of the motive of lucre, *id.*
proof of the intent to marry or defile, *id.*
venue, 296.
abduction of girls under sixteen, *id.*
proof of the taking of the girl out of the possession of the father, &c. *id.*
proof of the want of consent of the father, &c. 197.
competency of witnesses on, 116.

ABETTORS,
Proof with regard to, 166.
See *Accessories.*

ABORTION.
offence at common law, 190.
procuring abortion where the woman is quick with child, *id.*
proof of the intent, *id.*
proof of the being quick with child, 191.
proof of the administering, *id.*
proof of the nature of the thing administered, *id.*
procuring abortion where the woman is not quick with child, 192.

ACCEPTANCE, See *Forgery.*
forged, proof of uttering will not support averment of uttering forged bill, 398.

ACCESSORIES,
proof with regard to aiders and abettors, 166.
what presence is sufficient to make a party principal in the second degree, *id.*
punishment of, 167.
proof with regard to accessories before the fact, 167.
by the intervention of a third person, 168.

ACCESSORIES—(*continued.*)
degree of incitement, 168.
principal varying from orders, *id.*
what offences admit of accessories, 170.
trial and punishment, *id.*
proof with regard to accessories after the fact, 171.
in burglary, 259.
in coining, 310.
in forgery, 408, 409.
in manslaughter, before the fact, cannot be, 556.
in murder, 568, 569.
in malicious enquiries, 546.
in administering unlawful oaths, 668.
before the fact, to self murder, 647.
in piracy, 696.
in offences relating to the post office, 701.
in rape, 710.
ACCIDENT,
where it excuses assault, 211.
from discharge of fire arms, 584.
ACCUSING
of infamous crime, 773.
of murder, &c. 771.
of crimes punishable with death, transportation, &c. 773.
ACCOMPLICE,
admissibility of evidence of, 117 *et seq.* See *Witness.*
dying declarations of, 23, 24.
ACQUIESCENCE, See *Consent.*
of public, to prove liability to repair new bridge, 248.
whether it will excuse a nuisance, 661.
ACT OF BANKRUPTCY,
proof of, 222.
ACT OF PARLIAMENT, See *Statute.*
AD QUOD DAMNUM,
writ of, 452.
ADDITION
to name of prosecutor not necessary, 81.
variance in statement of, *id.*
ADJUDICATION
in bankruptcy, proof of, 223.
ADMINISTRATION,
proof of letters of, 159.
ADMIRALTY,
examinations, touching offences within jurisdiction of, 44.
venue in case of offences within jurisdiction of, 187.
ADMISSION, See *Confession.*
where it precludes the necessity of producing a written instrument, 3.

ADMISSION—(*continued.*)
by prisoner, in case of bigamy, of former marriage, 229, 234.
by prisoner in forgery, as to person whose name is forged, 404.
of publication of libel, 533.
ADOPTION
of highway by parish, 457.
ADULTERY,
sufficient provocation to render homicide manslaughter, 558.
AFFIDAVIT
by person convicted of crime, 101.
proof of, made in causes, 157.
proof of perjury upon, 675.
AFFIRMATION
of Quaker or Moravian, punishable as perjury, 676.
AFFRAY,
nature of, and evidence, 198.
where party engaged in, may be arrested, 614.
breaking open doors by peace officers, in case of, 629.
AGENT,
notice to, to produce, 9.
confessions of, when admissible against principal, 40.
occupation by, in burglary, 271.
embezzlement, by, 351.
agency in libel, 535.
AGISTER,
property may be laid in, in larceny, 515.
AIDERS,
proofs with regard to, 166. See *Accessories.*
ALE-HOUSE. See *Inn.*
ALTERING
the legal coin, 299.
equivalent to forging, 408.
a forged deed, 413.
AMBASSADOR,
proof of marriage in house of, 241.
AMICABLE CONTEST.
when excuse for an assault, 212.
ANCHORS,
receiving anchors, &c. weighed up, 553.
ANCIENT DOCUMENTS,
old leases, evidence of boundaries, 22.
ANIMALS,
how to be described in an indictment, 77, 511.
stealing of, 509, *et. seq.* See *Larceny.*
murder, by means of, 571.
suffering dangerous animals to go at large, a nuisance, 665.

ANIMUS FURANDI,
proof of, in burglary, 260.
in larceny. See *Taking*, in *Larceny*.
in piracy, 695.
in robbery, 736.
ANSWER
in chancery, proof of, 158.
proof of perjury on, 675, 681, 683.
APPOINTMENT
of persons acting in public capacity, proof of, by parol, 7, 14.
of officers of customs, &c., 762.
APPREHENSION,
assault with intent to prevent, 217.
shooting at, &c. with intent to prevent lawful apprehension, 656.
rewards for apprehension of offenders, 183.
APPRENTICE,
unreasonable correction of, 585.
death of, by starvation, murder, 592.
by ill treatment, 593.
not supplying with food, an indictable offence, 592.
ARRAIGNMENT,
mode of, 174.
ARREST. See *Peace Officer*.
protection of witnesses from, 93.
proof of, on prosecution for escape, 353.
must be justifiable, *id.*
by peace officers in general, 611, *et seq.* See *Peace Officer*; and *Murder*.
power to arrest under particular statutes, 616.
metropolitan police act, *id.*
regularity of the process, 621.
what constitutes, 631.
ARSON,
offence at common law, 198.
proof of the burning, 199.
proof that the house burnt is the house of another, *id.*
proof of the malice and wilfulness, 201.
offence by statute, 201.
setting fire to houses, *id.*
proof of the setting fire, &c., 202.
proof of the property set fire to, 203.
proof of the intent to injure or defraud, 206.
setting fire to stacks, 207.
to ships, 208.
negligent burning, 209.
ASPORTAVIT,
in cases of larceny of cattle, 285.

ASPORTAVIT—(*continued.*)
in stealing in a dwelling-house, 332
what sufficient in larceny, 470.
ASSAULT,
hearsay, when admissible on prosecution for, 21.
allegation of, divisible, 77.
what amounts to, 210.
what does not amount to, 211.
accident, *id.*
amicable contest, 212.
lawful chastisement, *id.*
self defence, 213.
interference to prevent breach of the peace, *id.*
defence of possession, 214.
execution of process by officers, 215.
summary conviction, bar to indictment, 215.
when a sufficient provocation in homicide, 596, 640.
with intent to commit felony, 216.
on officers endeavouring to save shipwrecked property, 217.
on officers employed to prevent smuggling, *id.*
with intent to spoil clothes, 218.
by workmen, 219.
on deer-keepers and their assistants, 330.
by poachers, 446, 447.
with intent to commit rape, 712.
with intent to rob, 754.
ASSEMBLY, UNLAWFUL,
what constitutes, 730.
of smugglers, 759.
ATTACHMENT,
for disobeying subpœna, 90
ATTESTING WITNESS,
when he must be called, 161.
where waived, *id.*
ATTEMPT
to commit bribery, a misdemeanor, 244.
to provoke a challenge, 289.
to commit felony, party may be arrested without warrant, 614.
to commit murder, 648.
ATTORNEY,
privilege of, as witness, 144.
extends to his agents and clerks, *id.*
and to an interpreter, 145.
privilege that of the client, *id.*
to what matters it extends, *id.* 146.
where party to transaction not privileged, 152.
not liable for maintenance, 543.

AUTRE FOIS ACQUIT,
plea of in burglary, 283.
AUTRE FOIS CONVICT,
plea of, how proved, 155.
AWARD
of commissioners setting out boundaries, 458.

BAIL,
incompetency of, as witnesses, 111.
false personation of, 359.
BAILEES,
larceny by, 478.—See *Larceny.*
determination of bailment, 479.
property when to be laid in, in larceny, 515.
captain of ship, as bailee, not guilty of piracy, 695.
BAILIFF. See *Peace-officer.*
private bailiff, notice of his authority, 626.
BANK OF ENGLAND. See *Funds.*
embezzlement by officers and servants of, 350.
proof of being an officer entrusted, &c. *id.*
proof of the bills, &c. 351.
intent to defraud in forgery, 401.
forgeries relating to the public funds, 425.
clerks in, making out false dividend warrants, 427.
forgeries in general, relating to, 428, *et seq.* See *Forgery.*
BANK NOTES,
filed at the bank, copy admissible, 160.
halves of, may be described as chattels, 345.
bank post bill not a bill of exchange, *id.*
passing notes of bank that has stopped, 368.
forgery of, degree of resemblance, 393.
forgery of in general, 428, *et seq.* See *Forgery.*
of the paper for, *id.*
engraving plates, &c. 430.
embezzlement of by officers of post office, 697, *et seq.* See *Post Office.*
country bank notes, paid in London, within the statute, 700.
may be described as a *warrant* for the payment of money, *id.*
BANK POST BILL
cannot be described as a bill of exchange, 407.
embezzlement of, by officers of post office, 698.
BANKER. See *Check.*
embezzlement by, 351.
obtaining credit with and procuring him to pay money to a creditor is not an obtaining money, 370.
making paper for forging banker's notes, 431.
engraving notes, *id.*

BANKRUPT,
wife of, when competent witness, 115.
concealing effects, &c. 220.
proof of the trading, 221.
of the petitioning creditor's debt, *id.*
of the act of bankruptcy, 222.
of the commission or fiat, *id.*
of the commissioner's oath, 223.
of the adjudication, *id.*
of the notice to the bankrupt, *id.*
of the Gazette, *id.*
of the bankrupt's examination, 224.
of the concealment, &c. *id.*
of the value of the effects, 225.
of the intent to defraud, 226.
BANNS,
proof of marriages by, 230.
marriages in wrong name, 230, 231.
BAPTISM,
register of, forging, 433.
BARN,
demolishing, 729.
BARON AND FEME. See *Wife.*
BARRATRY,
nature of the offence, 226.
BASTARD,
evidence on indictment for murder of, 567.
BATHING
in exposed situation a nuisance, 663.
BATTERY,
what will amount to, 210.
BAWDY-HOUSE
a public nuisance, 664.
feme covert indictable for keeping, *id.*
so a lodger, *id.*
proof on indictment for keeping, *id.*
BEES,
stealing of, 509.
BELIEF,
false swearing to, perjury, 577.
BIGAMY,
first wife an incompetent witness, 114.
former law and statute 9 G. 4. c. 31. 227.
proof of the marriages, 228.
in general, *id.*
in England, 229.
by banns, 230.
by licence, minors, 233.
in Scotland, 233.

BIGAMY (*continued.*)
in Ireland, 236.
marriages abroad, 236.
in British factories, 239.
in British colonies, 240.
in houses of ambassadors, 241.
Venue, 242.
proof for the prisoner under the exceptions in the marriage act, 242.
BILL OF EXCHANGE,
forgery of, unstamped, 392.
degree of perfectness, 394, 395, 396.
averment of forged *bill*, not proved by forged acceptance, 398.
bank post bill cannot be described as, 407.
forgery of, stat. 1 W. 4. c. 66. 413.
must purport to be legally such, 414.
must be in a negotiable shape, 415.
drawn in pursuance of particular statute, *id.*
stealing of, 505.
embezzling of, by officers of post office, 697.
BLANK WARRANTS,
illegal, 622.
BLASPHEMY
at common law, 524.
by statute, *id.*
BOAT,
stealing from, 508.
firing at, by smugglers, 760.
BOUNDARIES,
hearsay when admissible to prove, 22.
venue in offences on boundaries of counties, 185.
of highways, proved by award of commissioners, 457, 458.
BREW-HOUSE,
when a nuisance, 662.
BREAKING,
proof of, in burglary, 253.
breaking out of a dwelling-house, 283.
proof of, in house-breaking, 331.
a building within the curtilage, 336.
proof of, in prison breach, 706.
into shop, warehouse, &c. 756.
BRIBERY,
nature of the offence, 243.
bribery at elections for members of Parliament, 244.
BRIDGES,
competency of inhabitants on questions respecting, 110.
indictment for not repairing, 245.
proof of the bridge being a public bridge, *id.*

BRIDGES—(*continued.*)
highway at each end, 247.
proof of the bridge being out of repair, *id.*
proof of the liability of the defendant, *id.*
at common law, *id.*
new bridges, 248.
public companies, 249.
individuals *ratione tenuræ*, 250.
proof in defence, 250.
by counties, 250.
by minor districts and individuals, 251.
by corporations, *id.*
venue and trial, *id.*
competency of witnesses, *id.*
indictment for maliciously pulling down bridges, *id.*
BROKER,
embezzlement by, 351.
BUILDINGS,
what buildings form part of the dwelling-house, 262, 263.
breaking and entering a building within the curtilage, 336.
BUOYS,
wilfully cutting away, 553.
BURGLARY,
offence at common law, 253
statute 7 & 8 G. 4. c. 29. *id.*
proof of the breaking, *id.*
general instances, 254.
doors, *id.*
windows, 255.
chimneys, 256.
fixtures, cupboards, &c. 257.
walls, *id.*
gates, 258.
constructive breaking, *id.*
fraud, *id.*
conspiracy, *id.*
menaces, 259.
by one of several, *id.*
proof of the entry, *id.*
introduction of fire-arms or instruments, 260.
by firing a gun into the house, 261.
constructive entry—by one of several, *id.*
proof of the premises being a mansion-house, *id.*
occupation, 264.
temporary or permanent, 265.
house divided without internal communication, and occupied by several, 266.
occupied by same person, 267.

BURGLARY—(*continued.*)
where there is an internal communication, but the parts are occupied by several under distinct titles, 268.
by lodgers, 269.
by wife or family, 270.
by clerks or agents of public companies, &c. 271.
by servants, occupying as such, 273.
by servants, occupying as tenants, 275.
by guests, &c. 276.
by partners, 277.
outbuildings and curtilage, *id.*
proof of the offence having been committed in the night-time, 278.
proof of the intent to commit felony—felony at common law or by statute, 279.
variance in statement of, 281.
minor offence, larceny, &c. *id.*
proof of the breaking out of a dwelling-house, &c. 283.
proof, upon plea of *autre fois acquit*, *id.*
on indictment for, prisoner may be convicted of larceny, 75.
BURIAL,
conspiracy to prevent, indictable, 315.
refusing to bury, indictable, 328.
burying without inquest, *id.*
of bodies cast on shore, 329.
register of, forging, 433.
BURNING. See *Arson.*
negligent burning, 209.

CANAL,
maliciously breaking down banks of, 548.
stealing goods from vessels on, 508.
CAPABILITY
of committing crimes, 778, 779
CARRIERS,
larceny by, 478. See *Larceny.*
special property in goods, 516.
CARRYING AWAY,
what sufficient in larceny, 470.
CATTLE,
variance in description of, 77, 78.
stealing horses, cows, &c. 284.
killing, with intent to steal, 286.
maiming, &c. of, 286.
proof of the animal being within the stat. 287.
proof of the injury, 287.
proof of malice and intent, 288.

CERTIFICATE
of commissioners of stamps, how proved under 38 Geo. 3. c. 78., 532.
CERTIFICATE OF CONVICTION. See *Conviction*.
CHALLENGE
to fight, what amounts to, 289.
proof of intent, *id.*
venue, *id.*
CHAMBERS,
burglary may be committed in, 267.
stealing in, a stealing in a dwelling-house, 331.
CHAMPERTY,
what amounts to, 544.
CHANCE-MEDLEY,
what amounts to, 465, 642.
CHAPEL,
demolishing, 729.
sacrilege in, 756.
CHARACTER,
evidence of character of prosecutor when admissible, 72.
of prisoner, *id.*
of general character of witness, when admissible, 136.
CHASTISEMENT,
lawful, excuse in assault, 212.
excessive, causing death, 585.
assault with intent to chastise, resistance to, 641.
CHEATING,
what cheats are indictable, 290.
affecting the crown and the public, *id.*
public justice, 291.
false weights and measures, *id.*
what cheats are not indictable, 292.
bare assertion, *id.*
breach of contract only, 293.
CHECK
on banker, giving, without effects, not indictable at common law, 292.
but as a false pretence by stat. *id.* 363.
proof of forgery of, 387.
is both a warrant and order for payment of money, 420.
when not the subject of larceny, 507.
extorting by duress, 767.
CHEMIST
guilty of manslaughter for death caused by wrong drug, 591.
CHILD,
in *ventre sa mere*, not the subject of murder, 190. See *Abortion*.
chastisement of, excuse in assault, 212.
stealing of, 294.

CHILD—(*continued.*)
concealment of birth of, 295.
property when to be laid in, 515.
murder of, in the birth, 565.
name of, 566, 567.
unreasonable correction of, causing death, 585.
death of, by exposure, murder, 592.
carnal knowledge of female children, 711.
CHIMNEY,
entering by, burglary, 256, 260.
CHOSES IN ACTION,
stealing of, 594.
CHRISTIAN RELIGION,
libels on, 524.
CHURCH,
setting fire to, 201.
demolishing, 729.
sacrilege, 756. See *Sacrilege.*
CLAIM,
goods taken under fair claim of right, not larceny, 473.
so in robbery, 735.
CLERK,
who is, within the 7 & 8 G. 4. as to embezzlement, 341.
person employed in capacity of, 342.
COACHMAN,
furious driving by, 441.
finding goods in hackney-coach, 470.
of stage-coach, property may be laid in, 516.
COAL-MINE,
setting fire to, 547.
COCK-PIT,
keeping of, a public nuisance, 664.
COCK-THROWING,
an unlawful sport, 587.
COERCION
of wife by husband, 785.
COIN,
proof of guilty knowledge of coin being counterfeit, 69.
proof of counterfeiting the gold and silver coin, 297.
proof of the counterfeiting, *id.*
proof that the coin is counterfeit, 298.
proof of colouring counterfeit coin or metal—and filing, and altering legal coin, 299.
proof of impairing or diminishing the coin, 300.
proof of uttering counterfeit gold or silver coin, *id.*
proof of the simple uttering, 301.
proof of the compound offence of uttering, having other false coin in possession, *id.*

COIN—(*continued.*)
proof of buying or selling counterfeit coin for less value than its denomination — importing counterfeit coin, 303.
proof of having counterfeit coin in possession, 304.
proof of counterfeiting, &c. the copper coin, *id.*
proof of counterfeiting foreign coin, 305.
proof of uttering foreign counterfeit coin, 306.
proof of having in possession five or more pieces of foreign counterfeit coin, 307.
proof of offences with regard to coining tools, 308.
venue, 310.
traversing, *id.*
accessories, *id.*
interpretation clause, *id.*
COLLATERAL FACTS,
evidence of, when admissible, 58, 59. See *Issue.*
in proving riots, 727.
COLONY,
proof of marriage in, 240.
COLOURING
of coin, 299. See *Coin.*
COMMISSION
of bankrupt, proof of, 222.
COMMISSIONERS,
oaths taken before, perjury, 673.
COMPANIES,
public, liability of, to repair bridges, 249.
burglary in house of, 271, 272.
larcenies connected with stock of, 505.
property laid in, in larceny, 519.
directors of, indictable for nuisance committed by their servants, 666.
COMPARISON
of hand-writing inadmissible, 163.
evidence of persons skilled in detecting forgeries, 164.
COMPOUNDING OFFENCES,
felonies and misdemeanors, 311.
informations on penal statutes, *id.*
misprision of felony, 312.
taking rewards for helping to stolen goods, *id.*
CONCEALMENT,
not in itself evidence of stealing, 17.
of his effects by a bankrupt, 220, 224. See *Bankrupt.*
of birth of child, 295.
on indictment for murder, prisoner may be convicted of concealment, 296.
CONFESSIONS,
effect of, in general, 28.

CONFESSIONS—(*continued.*)
party may be convicted on, alone, 28.
with regard to degree of credit, *id.*
must be voluntary, 29.
cases where inadmissible after promises, *id.*
cases where held admissible, 30.
where impression removed from mind of prisoner, 31.
threat or promise from person having no power, 33.
what amounts to a threat, 34.
must have reference to temporal matters, 35.
obtained by artifice, 35.
cases where witnesses have made statements, and have afterwards themselves been tried for the offence, 36
compulsory examinations, *id.*
evidence of facts, the knowledge of which has been obtained by improper confessions, *id.*
declarations accompanying an act done, 38.
only evidence against the party making them, *id.*
whether the names of other persons mentioned by the prisoner are to be read, 39.
confession of principal not evidence against accessory, 40.
by agents, *id.*
prosecutor how affected by declarations of agent, 41.
whole confession to be taken together, *id.*
confession of matters void in point of law, or false in point of fact, 42.
CONFIRMATION
of evidence of accomplice, 120.
CONIES,
taking or killing, in the night, 442.
CONSENT,
negative evidence of, 6, 56.
proof of want of, of father, in prosecutions for abduction, 197
marriage of minor, without, 233.
CONSPIRACY:
acts and declarations of conspirators when admissible, 60. See *Declarations.*
to commit burglary, 258, 259.
proof of nature of conspiracy in general, 313.
to charge party with offence, 314.
to pervert the course of justice, *id.*
relating to the public funds, &c. 315.
to create riot, &c., *id.*
against morality and decency, *id.*
to marry paupers, *id.*
affecting trade—to defraud the public, 316.
by workmen to raise wages, 317.

CONSPIRACY—(*continued.*)
to extort money from individuals, 319.
to defraud individuals, *id.*
to injure individuals in their trade, 320.
to commit a civil trespass, *id.*
legal associations, 321.
proof of the existence of a conspiracy, *id.*
declarations of other conspirators, 324.
proof of acts, &c., done by other conspirators, 325.
proof of the means used, *id.*
cumulative instances, 326.
proof of the object of the conspiracy, *id.*
cross-examination of witnesses, 327.
Venue, *id.*
CONSTABLE. See *Peace-officer.*
CONTRADICTION,
of witness by party calling him, 136.
by other witnesses by opposite party, 140.
CONTAGION,
carrying about child with contagious disorder, 665.
CONVICTION,
negative evidence in cases of, 56.
proof of, to render witness incompetent, 101.
cannot be given in evidence in favour of party by whose testimony it was procured, 107.
former conviction, proof of, 178.
summary, for assaults, 215.
former conviction, proof of, in indictment for coining, 303.
on indictment for escape, 355.
against parish for not repairing, evidence on another indictment, 461.
against townships, 482.
for publishing one copy of libel, no bar to another indictment, 531.
proof of guilt of principal in receiving, 715.
COPPER COIN,
offences relating to, 304, 305.
foreign counterfeit copper money, 308.
COPY.
old copy of record when admissible, 155.
office copies, 155.
copies by authorised officers, *id.*
of public books, evidence, 160.
of marriage registers, &c., 433.
of newspaper, when evidence, 531, 532,
CORN,
setting fire to stack of, 207.
CORONER,
depositions taken before, 53.

CORONER—(*continued.*)
burying corpse without sending for, 328.
indictable for not performing the duties of his office, 670.
CORPORATION,
copy of corporation books admissible, 160.
may be liable to repair of bridges, 247.
evidence in defence by, 251.
burglary in house of, 271.
statement of intent to defraud, in forgery, 401.
when liable to repair highways, 460.
property, how laid in, in larceny, 519.
chief officers of, absenting themselves on charter day, 670.
CORPSES. See *Dead Bodies.*
COSTS,
stat. 7 G. 4. c. 64. s. 22—91.
cases decided upon that stat., 180, 181.
mode of payment by treasurer of county, 181.
expenses of prosecution for capital offences in exclusive jurisdiction, 182.
rewards for the apprehension of offenders, 183.
allowance to widows of persons killed, 184.
COUNSEL,
privilege of as witness, 144.
not liable for maintenance, 543.
COUNTERFEITING. See *Coin.*
proof of, 297.
word "counterfeit" rejected as surplusage, 397.
COUNTIES,
venue in offences on boundaries of, 185.
of city or town corporate, 186.
liability of, to repair of bridges, 247, *et seq.* See *Bridges.*
evidence in defence by, 250.
goods belonging to, how described in larceny, 520..
COUNTING-HOUSE,
breaking and stealing in, 756.
COURTS. See *Inferior Courts.*
ordering witnesses out of, 123.
where the publication of proceedings of is a libel, 540.
stealing, &c., proceedings of, 503.
COVENANTER,
form of oath by, 98.
COWS,
variance in description of, 77.
stealing of, 284.
CREDIT,
what, to be attached to confessions, 29.
of witnesses in general, how impeached and supported. 139. See *Witness.*
CRICKET,
game at, within statute 9 Anne, c. 14, 448.

CROSS-EXAMINATION,
in general, 127.
credit of witness impeached by irrelevant questions on, 139.
in conspiracy, 327.
CUMULATIVE OFFENCES,
evidence in case of, 66.
in conspiracy to defraud, 326.
in indictment for keeping a bawdy-house, 664.
CUPBOARDS,
breaking of, whether burglary, 257.
CURTILAGE,
what constitutes, in burglary, 278.
breaking and entering a building within, 336.
CUSTODY
of ancient documents, 161.
of law, goods in, 513.
CUSTOM,
immemorial when presumed, 14.
hearsay admissible to prove, 22.
townships liable to repair highways by, 459.
CUSTOMS (KING'S,)
venue in case of offences committed at sea, 188.
in other cases, 189.
forgeries relating to, 438.
offences by smugglers against, 759, *et seq.*
enactments respecting evidence in prosecuting, relating to, 761, 762.
CUTTING,
proof of, under stat. 9 G. 4. c. 31—651.

DEAD BODIES. See *Burial.*
offences relating to, 328.
no property in, 517.
DEAD PERSONS,
libels on, 527.
DEAF AND DUMB,
when competent as witness, 95.
arraignment of, 174.
DEATH,
presumption as to, 19, 20.
depositions admissible in case of, 49.
proof of the means of killing in murder, 571.
variance in proof of, 577.
DEBENTURE,
stealing of, 505.
DECENCY,
public, conspiracies against, 315.
dead bodies, offences relating to, 328.

DECLARATIONS
where admissible, 21.
in cases of rape, *id.*
of assault, *id.*
of treason, *id.*
of rioting, 22.
of pedigree, *id.*
of public right, *id.*
of persons having no interest to misrepresent, 23.
dying declarations, *id.* See *Dying Declaration.*
accompanying an act done, admissible though not receivable as a confession, 38.
of conspirators when admissible, 60.
letters and writings of, 61.
not necessary that they should have come to hand, 62.
as to time and place of finding, *id.*
collateral declarations of prisoners, when admissible, 71.
of husband and wife, 113.
former declarations of witness, if admissible to support his testimony, 142.
of conspirators, 324.
of party administering illegal oath, evidence of motive, 668.

DECREE,
in equity, proof of, 158.

DEDICATION
of way to the public, 451.

DEED,
forgery of, at common law, 382.
in general, 413.
stealing of, 505.

DEER,
stealing of, 329, 509.
power of deer-keepers to seize guns, 330.
assaulting them or their assistants, *id.*

DEGRADING QUESTIONS,
whether witness is bound to answer, 133.

DEMAND,
demanding money with menaces, 765.
what amounts to a "demand," 766.

DEMOLISHING
houses, &c. stat. 7 & 8 G. 4. c. 30—729.
what is a "beginning to demolish," *id.*

DEPOSITIONS,
statute 7 G. 4. c. 64—49.
where admissible, *id.*

DEPOSITIONS—(*continued.*)
in case of death, 49.
or insanity, *id.*
or, semble, inability to travel, *id.*
witness kept back by prisoner, 50.
does not extend to treason, *id.*
mode of proof, *id.*
mode of taking, *id.*
in presence of prisoner, 51.
where present during part of time, *id.*
signature, 52.
parol evidence not admissible to vary, *id.*
admissible on trial of other offences, *id.*
admissible to contradict witness, *id.*
case of several depositions, 52.
before the coroner, *id.*
whether prisoner must be present, 53.
depositions in India, *id.*
depositions by consent, 55.
proof of depositions in equity, 158.
DETAINER, FORCIBLE. See *Forcible Entry and Detainer.*
proof of the detainer being forcible, 377.
DILIGENCE,
in searching for lost instrument, 11.
in procuring information of death of wife in bigamy, 242.
DISABLING,
proof of intent to disable, stat. 9 G. 4. c. 31—654.
DISFIGURING,
proof of intent to disfigure, stat. 9 G. 4. c. 31—654.
DISORDERLY HOUSE. See *Bawdy-house, Gaming-house, Nuisance.*
DISSECTION,
taking up body for, indictable, 328.
of bodies of murderers abolished, 562.
DISSENTING CHAPEL,
not within statute as to sacrilege, 756.
demolishing of, 729.
burning of, 202.
DISTRICT,
inhabitants of, if bound to repair highways, 459.
defence by, 462.
DIVIDEND WARRANTS,
false, by clerks in Bank, 427.
embezzlement of, by officers of Post-office, 697.
DIVISIBLE AVERMENTS,
instances of, 74, *et seq.*
DIVORCE,
what a defence in bigamy, 243.

DOCUMENTARY EVIDENCE,
acts of parliament, 153.
records, 154.
office copies, and copies by authorised officers, 155.
inquisitions, 156.
verdicts, *id.*
affidavits made in causes, 157.
proceedings in equity, 158.
depositions, *id.*
judgments and proceedings of inferior courts, 159.
probate and letters of administration, *id.*
ancient terriers, documents, &c., 160.
public books, 159.
private documents, 161.
attesting witness, *id.*
when waived, *id.*
hand-writing, 162.
stamps, 164.
DOG,
not the subject of larceny, 510.
statute 7 & 8 Geo. 4. c. 29,—511.
DOORS,
breaking of, in burglary, 254.
when peace officer justified in breaking, 629, 630.
DRIVING,
negligent, death caused by, manslaughter, 583.
furious, 441.
DROWNING,
attempt to drown, stat. 9 G. 4. c. 31,—649, 650.
DUELLING,
when it amounts to murder, 610.
guilt of seconds in, 611.
challenging to fight, 289.
DWELLING-HOUSE.
what constitutes a man's own house, in arson, 199.
setting fire to, stat. 7 & 8 Geo. 4. c. 30,—201.
assault justifiable in defence of, 214, 629, *et seq.*
proof of premises being such, in burglary, 261 to 278.
See *Burglary.*
breaking out of, burglary by, 283.
housebreaking, 331.
statute 7 & 8 G. 4. c. 29, *id.*
proof of the breaking and entering, *id.*
proof of the premises being a dwelling-house, *id.*
proof of the larceny, 332.
stealing in a dwelling-house to the amount of 5*l.*, 332.
statute 7 & 8 G. 4. c. 29., *id.*
proof of the stealing of the goods—what goods, 333.

DWELLING-HOUSE—(*continued.*)
proof of the value of the goods stolen, 333.
proof of the stealing being in a dwelling-house, 334.
consequences of verdict against one of several, as to part of the offence, 335.
indictment for burglary, *id.*
stealing in a dwelling-house, any person being put in fear, *id.*
statute 7 & 8 G. 4. *c.* 29, *id.*
proof that some person was put in fear, 336.
breaking and entering a building within the curtilage, *id.*
privilege of, with regard to outer doors not being broken, 629.
acts done in defence of, 629, 630, 631.
demolishing, 729.
DYING DECLARATIONS,
in general, 23.
admissible only in homicide, where the circumstances of the death are the subject of the declaration, 24.
whether admissible in civil cases, *id.*
the party must be aware of his situation, 25.
by child of tender years, 26.
where reduced into writing, 27.
evidence in answer to proof of, *id.*
of wife admissible against husband, 117.

EAST INDIA BONDS,
forgery of, 428.
embezzlement of, by officers of Post-office, 697.
EAVES-DROPPING,
a public nuisance, 665.
ECCLESIASTICAL COURT,
sentence of, defence in bigamy, 243.
ELECTION,
in case of embezzlement, 348.
where party is charged both as principal and receiver, 721.
EMBEZZLEMENT,
the whole sum stated need not be proved, 76.
by bankrupt of his effects, 220. See *Bankrupt.*
statute 7 & 8 Geo. 4. c. 29,—338.
proof of being a servant, 339.
what servants are within the statute, *id.*
wages or payment of servants, 341.
proof of being a clerk within the statute, *id.*
proof of being a person employed for the purpose, or in the capacity of a clerk or servant, 342.
proof of the chattels, money, &c. embezzled, 344.
proof of the embezzlement, 346.

EMBEZZLEMENT—(*continued.*)
embezzlement by persons employed in the public service, 348.
in the Bank of England, 350.
by bankers' agents and factor, 351.
by other persons, 354.
distinction between, and larceny, 344.
by officers of the Post-office, 697, *et seq.* See *Post-office.*
EMBRACERY,
what amounts to, 544.
ENGINES,
in mines, malicious injuries to, 547.
steam engines, nuisances, 662.
regulated by 1 & 2 G. 4. c. 45, *id.*
demolishing, 729.
ENGROSSING, 373.
ENTRY,
in burglary, proof of, 259 to 261.
in house-breaking, 331.
in forcible entry, 376.
unlawfully entering land for the purpose of taking game, 445. See *Game.*
ENTRY, FORCIBLE. See *Forcible Entry.*
EQUITY,
proof of proceedings in, 158.
ESCAPE,
proof of escape by the party himself, 355.
proof of the criminal custody, *id.*
proof of escape suffered by an officer, 356.
proof of arrest, *id.*
must be justifiable, *id.*
proof of voluntary escape, 357.
retaking, *id.*
proof of negligent escape, *id.*
retaking, 358.
proof of escape from the custody of a private person, *id.*
conveying tools to prisoner to assist in, 707.
EXAMINATION,
statute 7 Geo. 4. c. 64, 43.
felonies, *id.*
misdemeanors, 44.
offences committed at sea, *id.*
mode of taking examination, *id.*
questioning the prisoner, *id.*
must not be on oath, *id.*
when reduced into writing, and when not, 45.
cases of no writing, *id.*
particular part not taken down, 46.
signature, *id.*

EXAMINATION—(*continued.*)
informal examinations used to refresh memory of witness, 47.
mode of proof, 48.
examination of witnesses in general, 123, *et seq.* See *Witness.*
on the *voire dire*, 125.
in chief, 126.
cross-examination, 127.
re-examination, 128.
of bankrupt, proof of, 224.
EXCHEQUER BILLS,
not legally signed may be described as effects, 351.
forgery of, 428.
stealing of, 507.
embezzlement of by officers of Post-office, 697.
EXCISE,
copy of, books of admissible, 160.
venue in indictments for resisting officers of, 189.
forgeries relating to, 438.
EXCOMMUNICATION
does not render witness incompetent, 99.
EXCUSABLE HOMICIDE,
what amounts to, 464, 642.
EXEMPLIFICATION
of will, 159.
EXECUTORS,
when property to be laid in, 517.
EXPENSES. See *Costs.*
EXTORTION,
the exact sum need not be proved, 76, 671.
conspiracy to extort money, 319.
when indictable in general, 671.
FACTOR,
embezzlement by, 351.
FACTORY,
proof of marriage in British factory, 239.
FALSE PERSONATION.
offence at common law, 359.
by statute, *id.*
personating bail, acknowledging recovery, &c. *Id.*
of soldiers and seamen, 360.
personating owner of stock, and endeavouring to transfer, 426.
FALSE PRETENCES,
all the pretences need not be proved, 76.
statutory provision, 361.
what amounts to a false pretence, 362.
not necessary that words should be used, 366.
goods obtained upon an instrument void in law, *id.*

FALSE PRETENCES—(*continued.*)
proof of the false pretences, 367.
proof of the falsity of the pretence, 368.
proof of the intent to cheat or defraud, 369.
proof of the obtaining some chattel, money, or valuable security, *id.*
proof of the ownership of the property, 370.
proof of all being principals, 371.
defendant not to be acquitted, where the offence appears to be larceny, *id.*
restitution of the property obtained, *id.*
distinction between, and larceny, 362.
FELO DE SE,
party persuading another to commit self-murder, guilty of murder as principal, if present, 646.
trial of accessory, 647.
FELONY,
examination of prisoners in, 43.
proof of intent to commit, in burglary, 279.
compounding, 311.
misprision of, 312.
oath binding party to commit, 667.
FEME COVERT. See *Wife.*
FERRETS,
no larceny of, 509.
FIAT
in bankruptcy, proof of, 222.
FILING
of coin, 299.
FINDING,
goods procured by, when larceny, 474, *et seq.*
letters carried by post, 704.
FIREWORKS,
setting off, a nuisance, 665.
FISH,
where larceny could be committed of at common law, 371, 509, 510.
statute 7 & 8 G. 4. c. 29, wilfully taking or destroying fish, 372.
power to apprehend offenders, *id.*
taking oysters, *id.*
maliciously breaking down banks of fish ponds, 548.
FIXTURES,
breaking of, in burglary, 257.
larceny of, 499, 500.
FORCIBLE ENTRY AND DETAINER:
offence at common law, 374.
offence by statute, *id.*
proof of the entry, 376.
proof of the force and violence, *id.*

FORCIBLE ENTRY AND DETAINER—(*continued.*)
proof that the detainer was forcible, 377.
proof of the possession upon which the entry was made, 378.
proof that the offence was committed by the defendant, *id.*
award of restitution, 379.
competency of witnesses in, 107, 379.
FOREIGN BILLS,
forging bills, &c. purporting to be made abroad, 410.
FOREIGN COIN,
offences relating to, 305 to 308. See *Coin.*
FOREIGN LAW.
evidence of persons skilled in, 138, 239.
FOREIGN MARRIAGES,
proof of, 236 to 239.
FOREIGNERS,
libels upon, 527.
FORESTALLING, 373.
FORMER CONVICTION. See *Conviction.*
FORFEITURE,
questions subjecting witness to, 129.
FORGERY.
forgery at common law, 381.
proof of the false making, 383.
in the name of the party—assuming the name of a person in existence, *id.*
party forging having the same name, *id.*
fictitious name, 385.
assumed and borne by the party forging, 387.
proof of the false making—with regard to the apparent validity of the matter forged, 391.
substantial resemblance to true instrument, 393.
cases of non-resemblance, 395.
proof of the act of forging, 397.
proof of the uttering, 397.
proof of the disposing or putting off, 398.
proof of the intent to defraud, 400.
with regard to the party intended to be defrauded, 401.
proof of identity of the party whose name is forged, 403.
proof of the forged instrument, 405.
proof with regard to principals and accessories, 408.
proof of guilty knowledge, 409.
witnesses, *id.*
venue, *id.*
forgery of instruments not made, or purporting to be not made in England, 410.
interpretation clause, 411.
punishment, *id.*
forgery of particular instruments, 412.

FORGERY—*(continued.)*
forging wills, 413.
forging deeds, *id.*
proof of forging of bills of exchange—promissory notes and warrants, or orders for payment of money or delivery of goods, 414,
proof of forging bills of exchange, &c., *id.*
proof of forging warrants, &c., 415.
forging receipts, 421.
forgeries relating to the public funds, 425.
false entries in books of bank and transfer in false name, *id.*
proof of forging transfer of stock, and power of attorney to transfer, *id.*
proof of personating owner, and endeavouring to transfer stock, 426.
proof of forging attestation to power of attorney or transfer of stock, 427.
proof of clerks in the bank making out false dividend warrants, *id.*
proof of forging exchequer bills, East India bonds, &c., 428.
forgery and similar offences with regard to bank-notes, *id.*
proof of purchasing, receiving, &c., forged bank-notes, *id.*
proof of making or having moulds, &c., *id.*
proviso as to paper for bill of exchange, 429.
proof of engraving any bank-note, &c., 430.
proof of engraving any word, &c., *id.*
proof of making, &c. mould for manufacturing paper, 431.
proof of engraving bill of exchange, &c., *id.*
forgery of entries in public registers, 432.
forgery of stamps, 434.
forgery of other public documents, 437.

FORGERY,
evidence of hand-writing being forged, 5, 6, 164.
presumption of intent to defraud, 19.
proof of guilty knowledge, 66, *et seq.* See *Guilty Knowledge.*
competency of witnesses in, stat. 9 G. 4.—106.
evidence of, matter of opinion in, 137—164.
of franks, 705.

FORUM DOMESTICUM. See *Correction, Murder, Apprentice.*

FRANCE,
proof of law of marriage in, 239.

FRANKS,
forgery of, 705.

FRAUD,
in assuming wrong name to evade marriage laws, 231, 232.
constituting a constructive breaking in burglary, 258.
cheating, when indictable, 290.
when not, 292.
conspiracy to defraud individuals, 319.
by public officers, 670.
FREEHOLD,
larceny of things part of, 499, 500.
FRUIT,
larceny of, 502.
FUNDS,
conspiracies relating to, 315.
embezzlements relating to, 349.
forgeries relating to, 425, *et seq.* See *Forgery*.
larcenies relating to, 505.
FURIOUS DRIVING,
punishable as a misdemeanor, 441.

GAME,
taking or killing hares, &c. in the night, 442.
proof of the taking or killing, *id.*
proof that the offence was committed in some warren, &c. used for the breeding hares, &c., *id.*
proof of the offence being committed in the night, 443.
taking or destroying game by night, *id.*
proof of the former convictions, 444.
proof of the third offence, *id.*
proof of the situation and occupation of the land, *id.*
unlawfully entering land for the purpose of taking game, being armed, 445.
proof of the entering, &c., *id.*
proof of the entering, or being in the place specified, *id.*
proof of the purpose to take or destroy, *id.*
proof of being armed, 446.
assault upon persons apprehending offenders, *id.* 635.
GAMEKEEPERS,
power to arrest poachers, 635.
cases of murder of, 636, 637.
GAMING,
offence at common law, 447.
statute 9 Anne, c. 14., 448.
proof of the game, *id.*
proof of the winning at one time or sitting, 449.
statute 18 G. 2. c. 34, *id.*
GAMING-HOUSES,
a public nuisance, 663.
wife may be indicted for keeping, *id.*
proceeding under 25 G. 2. c. 36., 664.

GAOLER. See *Peace-officers.*
indictable for misusing his prisoners, 670.
suffering prisoner to escape, 357. See *Escape.*
GARDEN,
stealing in, 501, 503.
GATE,
breaking of, in burglary, 258.
GAZETTE,
proof of, 223.
GLASS HOUSE,
where a nuisance, 662.
GLEANING,
whether larceny, 473.
GOVERNMENT,
libels on, 525.
GRAND JURY,
matters before, privileged from disclosure, 150.
GREENWICH HOSPITAL,
embezzlements relating to, 354.
GRIEVOUS BODILY HARM,
proof of intent to do, statute 9 G. 4. c. 31., 655.
GRUDGE:
weight of old grudge, on indictment for murder, 610.
GUEST,
occupation by, in burglary, 276.
property may be laid in, in larceny, 505.
refusal to receive, by innkeeper, indictable, 663.
GUILT,
presumptive proof of, 15.
arising from possession of stolen property, 16.
GUILTY KNOWLEDGE,
evidence of other transactions to prove, 66. *et seq.*
uttering other forged notes, 67.
whether notes of same description, *id.*
Scotch law on this subject, 68.
declarations of prisoner as to former uttering inadmissible, 69.
where other notes subject of other indictment, *id.*
possession of other notes, *id.*
of receiver, 70.
in prosecutions for making coining-tools, &c., 309.
in forgery, 409.
in receiving stolen goods, 720.
GUNPOWDER.
gunpowder mills a nuisance, 665.

HABEAS CORPUS,
ad testificandum, when and how issued, 89.
how served, 90.

HANDWRITING,
primary evidence of, 5.
may be disproved by third person, 6.
evidence of signing-clerk not necessary on Bank prosecutions, *id.*
evidence of, in general, 162.
HARES,
taking or destroying, 442. See *Game.*
HAY,
setting fire to stack of, 207.
HEALTH,
public, selling unwholesome provisions, 290, 665.
nuisances injurious to, 659, 660.
exposing persons with contagious disorders, 665.
HEARSAY:
general nature of hearsay, 20.
admissible as part of the *res gestæ*, 20.
on questions of pedigree, 22.
on questions of public right, *id.*
of persons having no interest to misrepresent, or speaking against their own interest, 23.
of dying declarations, 23 to 28. See *Dying declarations.*
not evidence of liability to repair *ratione tenuræ*, 250.
contents of letter, 700.
HIGHWAY,
proof of, being within parish, 86.
prosecutor competent witness, 107.
at each end of, a bridge, repairs of, 247.
nuisances to highways, 456.
proof of the way being a highway, *id.*
proof of the highway as set forth, 451.
with regard to the *termini*, 452.
proof of changing, 453.
proof of the nuisance—what will amount to, *id.*
whether justifiable from necessity, 455.
not repairing highways, *id.*
proof of liability to repair, 456.
parish, *id.*
inclosure, 458.
particular districts and persons by prescription, *id.*
corporations, 460.
private individuals, *id.*
proofs in defence, 461.
parish, *id.*
districts, or private individuals, 462.
competency of witnesses, *id.*
HIGH SEAS. See *Admiralty venue.*

HOMICIDE. See *Manslaughter, Murder.*
not felonious, of three kinds, 464.
justifiable, *id.*
excusable, *id.*
by misadventure, *id.*
chance-medley, 465.
HOP-BINDS,
maliciously cutting or destroying, 551.
HORSE,
variance in description of, 78.
evidence on indictment for stealing, 284. 285.
horse-race within stat. 9 Anne, c. 14., 448.
maiming and wounding, 287.
poisoning, 288.
conspiracy to sell unsound horse, 320.
HOUSE. See *Dwelling-house.*
acts done in defence of, 629, 630, 631.
demolishing, 729.
HOUSEBREAKING, 331. See *Dwelling-house.*
HOUSE OF COMMONS. See *Parliament.*
HUNDRED,
competency of inhabitants of, 111, 483.
HUSBAND AND WIFE. See *Wife.*
competency of, as witnesses, 112, *et seq.* See *Witness.*
husband may be principal in rape on wife, 708.

IDEM SONANS,
rule of, 81.
IDENTITY,
proof of, in bigamy, 229.
of the person whose name is forged, 402.
in larceny, 512.
IDIOT,
incompetent witness, 95.
marriage of, 228.
arraignment of, 175.
disposal of, if found insane, *id.*
ILLEGALITY,
not to be presumed, 14.
IMPAIRING
the king's coin, 300.
IMPARLANCE, 175.
IMPLEMENT. See *Machinery.*
IMPORTING
of counterfeit coin, 303.
of foreign counterfeit coin, 306.
IMPRESSMENT,
cases of murder or manslaughter in course of, 617.
IMPRISONMENT,
proof of, in prison breach, 706.

INCLOSURE :
Inclosure Act, road set out under, when a highway, 450.
liability to repair highway by reason of, 458.
INDECENCY :
indecent libels, 425.
acts of, indictable as nuisances, 663.
INDIA,
depositions in, 54.
INDICTMENT,
divisible averments in, 74.
descriptive averments in, 77.
how proved, 154, 155.
quashing of, 177.
mere omission to do an act is not indictable, 210.
form of, in forgery, 405, 407.
INDORSEMENT
of bill of exchange, forgery of, what is within the statute, 385.
on warrant or order for payment of money not within statute 1 W. 4. c. 66,—413.
INFAMOUS CRIME,
admissions of prisoner as to other offences, 58.
proof of other attempts, *id.*
accusing of, 773.
INFAMY :
incompetency of witnesses from, 100, *et seq.* See *Witness.*
INFANT. See *Child.*
dying declarations of, 26.
when incompetent witness from want of understanding, 94.
marriage of, in Ireland, 236.
may be guilty of forcible entry, 379.
chastisement of, 212, 585.
murder of in birth, 565.
by exposure, 592.
concealment of birth, 295.
stealing of, 294.
property laid in, 515.
when presumed capable of committing rape, 708.
carnal knowledge of female infant, 711.
when incapable of committing crimes, 777.
in cases of misdemeanors, and offences not capital, *id.*
in cases of capital offences, 778.
INFECTION. See *Contagion.*
INFERIOR COURTS,
proof of judgments and proceedings in, 159.
INFIDELS
admissible witnesses, 96.

INFORMATIONS
on penal statutes, compounding, 311.
INFORMERS,
when competent witnesses, 108.
disclosures by, when privileged from being made public, 147.
to whom such disclosures must be made, *id.*
INHABITANTS,
competent witnesses, though penalties given to poor, 110.
competency of in general, *id.*
on indictments respecting highways, 462, 463.
of hundred not competent, 463.
INNS,
every one entitled to keep, at common law, 663.
disorderly, indictable, *id.*
innkeeper bound to supply guests, *id.*
setting up new inn in neighbourhood of others, *id.*
INNOCENCE,
presumption of, 14.
INNUENDO,
proof of in libel, 535.
INSANITY:
depositions admissible on insanity of witness, 49.
of prisoner, proceedings in case of, 175.
when it exempts from the consequences of crime, 778.
cases in which prisoners have been held not insane, 779.
cases in which they have been held insane, 782.
insanity caused by intoxication, 784.
INSCRIPTIONS,
on banners, &c., how proved, 4.
in family bibles, &c., 22.
INSOLVENT,
proof of discharge under insolvent debtors' act, 3.
INSURANCE,
proof of policy of, 2, 206, 207.
INTENT
to defraud, presumption of, 19.
in cases of forgery, *id.*
proof of by collateral circumstances, 71.
cases of threatening letters, *id.*
of libel, *id.*
of murder, *id.*
of treason, *id.*
averment of, divisible, 77.
on prosecutions for abortion, 190, 191, 192.
to marry or defile in cases of abduction, 195.
to injure or defraud in arson, 206.
of bankrupt to defraud, in concealing his effects, 225, 226.

INTENT—(*continued.*)
to commit felony, in burglary, 279.
variance in statement of, 281.
killing cattle with intent to steal, 286.
in maiming cattle, &c., 288.
to provoke a challenge, 289.
to defraud, in false pretences, 369.
to defraud, in forgery, 400.
mode of proof, *id.*
with regard to the party intended to be defrauded, 401.
malicious, in libel, 537.
in malicious injuries to the person, 653.
to murder, 654.
to maim, disfigure, or disable, *id.*
to do some grievous bodily harm, 655.
to prevent lawful apprehension, 656.
in perjury, 685.
in robbery, 735.
in assault, with intent to rob, 755.
INTEREST,
declarations of persons having no interest, 23.
of witnesses in general, 104 to 112. See *Witness.*
INTERPRETER:
acting between attorney and client, a privileged witness, 145.
INTESTATE,
goods of, in whom property is to be laid in larceny, 517.
INTOXICATION,
insanity, caused by, 784.
INTRODUCTORY AVERMENTS,
in libel, proof of, 528.
in perjury, 683.
IRELAND,
proof of Irish statutes, 154.
proof of Irish marriages, 236.
ISSUE,
evidence confined to, 57.
general rule, *id.*
cases where evidence of other transactions is admissible, as referable to the point in issue, 58.
acts and declarations of conspirators, 60.
admissible for prisoner as well as for prosecutor, 64.
cumulative offences, 66.
guilty knowledge, 66.
intent, 71.
evidence of character of prosecutor, 72.
of prisoner, *id.*
substance of the issue to be proved, 74.
general rule, *id.*

Issue—(*continued.*)
divisible averments, 74.
sufficient to prove what constitutes an offence, *id.*
in cases of intent, 77.
descriptive averments, *id.*
in cases of property stolen or injured, *id.*
name of the prosecutor or party injured, 79.
rule of *idem sonans*, 81.
name of third persons mentioned in the indictment, 82.
mode of committing offences, 83.
what are not material, 84.
averments as to time, *id.*
averments as to place, 85.
averments as to value, 86.

Jew:
form of oath by, 97.
proof of marriages of, 230.
Joint Tenant,
forcible entry by, 378.
larceny by, 514.
property of, how laid, 514.
Journals,
of parliament, how proved, 154.
Journies,
venue in case of offences committed on, 185.
Judgment,
reversal of, restores competency of infamous witness, 103.
how proved, 154, 155.
in inferior courts, 159.
bringing prisoner up for, 179, 180.
Jurat,
not conclusive evidence of place where affidavit was sworn, 676.
Jury,
discharge of, 177.
may give verdict on the whole matter in libel, 541.
imbracery of, 544.
Justice,
libels on the administration of, 526.
Justices of the Peace,
whether they can grant an attachment for disobeying a *subpœna*, 91.
they may fine and imprison, *id.*
matters communicated to, when privileged from disclosure, 148.
illegal proceedings by, indictable, 669.
Justifiable Homicide, 464. See *Murder*.

KIDNAPPING,
at common law, 465.
statute 9 G. 4. c. 31, *id.*
KILLING
cattle, with intent to steal, 286.
maliciously killing cattle, 287, 288.
KING,
the king's coin, what is, 310.
libels against, 525.
petition to, not libellous, 539.
property, when laid in, 350.

LAND TAX:
copy of books of commissioners, admissible, 168.
forgeries relating to, 438.
LARCENY,
definition, &c., 467.
proof of the *lucri causâ*, 468.
proof of the taking, 469.
proof of the manual taking, *id.*
proof of the felonious intent in the taking, 471.
goods obtained by false process of law, *id.*
goods taken by mistake, *id.*
goods taken by trespass, 472.
goods taken under a fair claim of right, 473.
goods procured by finding, 474.
goods taken by wife—or by wife and a stranger, 476.
proof of the taking with reference to the possession of the goods, 477.
original taking not felonious, *id.*
cases of bailees, 478.
determination of the bailment, 479.
cases of servants, 481.
cases of lodgers, 485.
stealing from the person, 486.
proof of the taking; distinction between larceny and false pretences—cases of larceny, 487.
no intent to part with the property by the prosecutor—original felonious intent on the part of the prisoner—cases of hiring horses, &c., 488.
various cases amounting to larceny, where goods have been obtained by false pretences, 491.
cases of pretended purchases, 493.
proof of the taking; distinction between larceny and false pretences—cases of false pretences, 495.
intent to part with the property by the prosecutor—original felonious intent on the part of the prisoner, *id.*

LARCENY—(*continued.*)
pretended purchases, 495.
cases of obtaining goods, &c. by false pretences, 497.
proof of the things stolen—things savouring of the realty at common law, 499.
things annexed to buildings, &c., 500.
mines, *id.*
trees, &c., 501.
written instruments, 503.
securities for money, &c., 504.
promissory notes, 506.
bankers' checks, 507.
exchequer bills, *id.*
goods from vessels, 508.
goods in the course of manufacture, 509.
proof of the thing stolen—animals, &c.—domestic animals, *id.*
animals *feræ naturæ*, *id.*
dead or reclaimed, 510.
animals kept for pleasure only, and not fit for food, *id*
dogs, pigeons, &c., 511.
proof of the thing stolen, 512.
identity, *id.*
value, *id.*
proof of the ownership—cases where it is unnecessary to allege or prove ownership, *id.*
intermediate tortious taking, *id.*
goods in *custodiâ legis*, 513.
goods of the offender himself, *id.*
goods of joint-tenants and tenants in common, 514.
goods in possession of children, 515.
goods in possession of bailees, 516.
in possession of carriers, drivers of stage coaches, &c., *id.*
goods of deceased persons, executors, &c., *id.*
goods of lodgers, 517.
goods of married women, *id.*
goods of persons unknown, 518.
goods of servants, *id.*
goods of corporations, *id.*
goods belonging to counties, &c., 520.
goods for the use of poor of parishes, *id.*
goods of trustees of turnpikes, *id.*
goods of commissioner of sewers, &c., 521.
venue, *id.*
on indictment for compound larceny, person may be convicted of simple larceny, 75.
so on indictment for burglary, 281.
proof of, in house-breaking, 332.

LARCENY—(*continued.*)
in dwelling house, to amount of 5*l.*, 332. See *Dwelling-house.*
distinction between, and embezzlement, 344.
and false pretences, 362.
defendant not to be acquitted when larceny, 371.
ring dropping. See *Addenda.*
LEADING QUESTIONS,
when they may be put, 126.
LEGITIMACY,
presumption of, 14.
LETTERS,
of conspirators, when admissible, 61, 325.
secreting, embezzling, &c., by officer of post-office, 697. See *Post-office.*
destroying, 699.
by persons not employed by the post-office, 701.
stealing by such persons, 702.
secreting letters found, 704.
threatening letters. See *Threats.*
LIBEL,
blasphemous libels—at common law, 524.
statutes, *id.*
indecent libels, 525.
libels on government, *id.*
libels on the administration of justice, 526.
libels on individuals, *id.*
proof of introductory averments, 528.
proof of publication—in general, 529.
of libels in newspapers, 531.
by admission of defendant, 533.
constructive publication, *id.*
proof of innuendo, 535.
proof of malice, 536.
proof of intent, 537.
venue, *id.*
proof for the defendant, 538.
statute 32 G. 3. c. 60,—541.
allegation of the offence divisible, 76, 77.
LICENCE,
presumption of, 14.
proof of marriage by, 233.
illegal grant of by justices, indictment for, 669.
LIFE,
presumption of duration of, 19, 20.
in cases of bigamy, 242.
LOCK,
maliciously breaking down, 548.

LODGINGS,
stealing from, what averments material, 84.
when burglary may be committed in, 269.
when burglary may be committed by lodger, 277.
lodger may be guilty of stealing in a dwelling-house in his own lodgings, 334.
goods stolen from, must be laid as his property, 517.
lodger, whether justified in defending possession of house, 638, 644.
may be indicted for keeping a bawdy-house, 664.
LOOM. See *Machinery.*
LOSS:
proof of loss of document, so as to let in secondary evidence, 11.
LUCRE,
proof of motive of, in prosecution for abduction, 195.
Lucri causa,
in larceny, 468.
in piracy, 695.
in robbery, 736.
LUNATIC,
when a competent witness, 95.
marriage of, 228.
arraignment of, 175.

MACHINERY,
malicious injuries to, 554.
threshing machines, 555.
MAGISTRATE. See *Justice of the Peace.*
MAHOMEDAN,
form of oath by, 98.
MAIL BAGS,
stealing of, 702.
MAIMING
of cattle, 286. See *Cattle.*
proof of intent to maim, statute 9 G. 4. c. 31.—654. See *Malicious Injuries.*
MAINTENANCE,
nature of the offence, 542.
when justifiable, 543.
in respect of interest, *id.*
master and servant, *id.*
affinity, *id.*
poverty, *id.*
counsel and attornies, *id.*
MALA PRAXIS,
when manslaughter, 561, 588 to 591.
MALICE,
presumption of, 18, 19.

MALICE—(*continued.*)
proof of in arson, 201.
to owner, not necessary, on prosecution for maliciously killing cattle, &c. 288.
proof of in libel, 536.
defendant may show absence of, 539.
to owner, need not be proved on indictment for malicious injury, 546.
proof of in murder in general, 579.
express malice prevents provocation being an excuse, 604.
general malice sufficient in case of malicious injury to the person, 655.
MALICIOUS INJURIES.
pulling down bridges, 252.
to cattle, 287.
to property, 545.
7 & 8 G. 4. c. 30, general clauses, 546.
with regard to mines, 547.
with regard to destroying engines, *id.*
with regard to breaking down sea banks, locks, canals, fish-ponds, &c., 548.
with regard to turnpike-gates, toll-houses, &c., 549.
with regard to trees and vegetable productions, *id.*
trees growing in parks, &c., above the value of 1*l.*, *id.*
trees wherever growing, above the value of 1*s.*, 550.
plants, &c., in a garden, 551.
hop-binds, *id.*
with regard to ships, 552.
destroying ships with intent, &c., *id.*
damaging a ship otherwise than by fire, with intent, &c., *id.*
exhibiting false lights, 552.
cutting away buoys, *id.*
receiving anchors, 553.
with regard to machinery and goods in the course of manufacture, 554.
threshing machines, &c., 555.
to the person, 649.
cutting or stabbing, 651.
wounding, 652.
proof of intent, 653.
to maim, disfigure, or disable, 654.
to do some grievous bodily harm, 655.
to prevent lawful apprehension, 656.
principals aiding and abetting, 657.
MANOR,
custom of, proveable by hearsay, 22.
lord of, may apprehend poachers, 635.

MANSLAUGHTER. See *Murder* throughout.
conviction for, on indictment for murder, 75.
distinction between, and murder, 556.
in cases of provocation, 557, 594, *et seq.*
in cases of mutual combat, 558.
in cases of resistance to peace-officers, &c., 559, 627, 628.
in cases of killing in the prosecution of an unlawful act, 560.
of lawful act, *id.*
statement of mode of killing, 577, 578.
in cases of sports, 581, 585.
in cases of correction by parents, &c., 585.
in cases of administering medicines, 588.
venue, where committed abroad or at sea, 563.
MANUFACTURE,
stealing goods in process of, 509.
maliciously destroying goods in process of, 554.
what manufactories are nuisances, 662.
demolishing buildings used in, 729.
MARK,
forgery of instrument signed with, 387.
perjury upon affidavit signed with, 675.
post-office marks, forgery of, 704.
MARKET,
taking money for the use of stalls in, extortion, 671.
MARRIAGE,
register not the only evidence of, 4.
proof of marriages in general, 228 to 241. See *Bigamy.*
of paupers, conspiracy to procure, when indictable, 315, 316.
register of, forging, 433.
MASTER. See *Servant* and *Apprentice.*
unreasonable correction by causing death, 585.
answerable for publication of libel by servant, 530, 534, 535.
maintenance of servant by, 543.
liable for nuisance by act of his servant, 666.
MATERIALITY:
of the subject sworn to, in perjury, 680.
MEDICAL MEN. See *Physician.*
opinions of, admissible, 21.
MEMBER OF PARLIAMENT. See *Parliament.*
MEMORY,
informal examination of prisoner used to refresh, 47.
MENACES,
constructive breaking by, in burglary, 259.
demanding money with, 765.
MINES,
malicious injuries to, 547.
setting on fire, *id.*

MINES—(*continued.*)
demolishing engines used in, 729.
MINOR,
proof of marriage by, 233.
bigamy, in case of marriage of, 243.
MISCARRIAGE. See *Abortion.*
MISDEMEANOR,
examination of witnesses, defendants, 43.
suffering punishment in cases of, renders witnesses competent, 102.
change of venue in cases of, 189.
compounding, 311.
no accessories in, 409.
killing on escape on charge of, 616.
arrests in cases of, 628.
MISNOMER,
cases of, 79, 80.
rule of *idem sonans*, 81.
MISPRISION
of felony, 312.
MISTAKE,
goods taken by, not larceny, 471.
MONEY. See *Coin.*
not within the Post-office statutes, 700.
demanding, with menaces, 765.
MORAVIANS,
evidence of, admissible, 99.
false affirmation punishable as perjury, 676.
MOULD,
for making bank-notes, 430.
for the purpose of coining, 308.
MURDER,
evidence of former declarations of prisoner, 71.
on indictment for, prisoner may be convicted of manslaughter, 75.
or concealment of birth of child, 296.
evidence of medical men in, 137.
statutory provisions respecting, 563.
disposal of bodies of murderers, *id.*
murders committed abroad, *id.*
at sea, 564.
proof of a murder having been committed, *id.*
proof of the murder as to the party killed, 565.
cases of children killed in the birth, *id.*
as to the name of the child, 566.
proof that the prisoner was the party killing, 567.
his hand need not do the act, *id.*
his presence required, *id.*
when done by another in his company, 569.

MURDER—(*continued.*)
proof of the means of killing, 571.
compelling another by threats to kill himself, *id.*
by savage animals, *id.*
by poison, 572.
accessories in poisoning, *id.*
by giving false evidence in capital cases, 573.
parties dying of wounds unskilfully treated, *id.*
where the deceased was intoxicated, 574.
decisions in the Scotch law on this subject, *id.*
variance in statement of means of killing, 577.
where mode of death substantially the same, *id.*
where not so, *id.* 578.
intermediate means need not be stated, *id.*
size, &c. of wound need not be stated, 579.
proof of malice, *id.*
in general, *id.*
death ensuing in the performance of an unlawful or wanton act, 580.
injury intended to be inflicted on another, *id.*
need not be an intended felony, *id.*
cases of riots, &c. 581.
riding restive horse, *id.*
from acts done in sport, manslaughter, *id.*
death ensuing in the performance of a lawful act, 582.
workmen throwing stones from houses, *id.*
negligent driving, 583.
accidents from loaded fire-arms, 584.
moderate correction exceeded, 585.
lawful sports, and contests, *id.* 586.
prize-fights, &c. 587.
misadventure, 588.
persons administering medicines, *id.*
intent to do bodily injury, death ensuing, 591.
exposure of infants, killing by neglect, &c. 592.
by master of apprentice, *id.* 593.
by gaoler, 592.
provocation in general, 594.
sought by prisoner, *id.*
by word or gestures only, 595.
by assault, 596.
in affrays with soldiers, *id.*
in apprehending debtor, 597.
nature of the instrument used, 598.
provocation must be recent, 601.
where there is express malice, 604.
proof of malice—cases of mutual combat, 605.
what provocation sufficient, *id.*
words not sufficient, 606.
nature of the instrument used, *id.*

MURDER—(*continued.*)
"up and down" fight, 608.
lapse of time, *id.*
old grudge, 610.
duelling, *id.*
where one party gives way, 611.
seconds when guilty, *id.*
proof of malice—peace-officers and others killed in performing their duty, *id.*
what persons are within the rule, *id.*
officers killed, or killing others, in the performance of their duty, 612.
their authority, *id.*
actual felons, *id.*
persons suspected, *id.*
misdemeanants, 613.
nature of the charge on which party is delivered to officer, 614.
persons found attempting to commit felony, *id.*
preventing breach of peace, *id.*
after affray over, *id.*
night-walkers, 615.
killing to prevent escape of misdemeanant, 616.
where empowered to arrest without warrant, *id.*
cases of impressment, 617.
cases of conflicting authority of peace-officers, 618.
during what period officer has authority, 619.
acting out of jurisdiction, 620.
warrant directed to particular officer by name, 621.
statute 5 G. 4. c. 18. *id.*
proof of warrant or writ, *id.*
regularity of the process, 621.
not defective in frame, *id.*
defective in frame, *id.*
third person interfering, in case of defective process, 622.
notice of the authority, 625.
known officer, 626.
in the night, *id.*
bailiff of the leet, *id.*
assistant to constable, *id.*
private or special bailiff, *id.*
mode of executing their duty, 627.
where the offender flies, *id.*
where the offender has been indicted, *id.*
on suspicion of felony, *id.*
in cases of misdemeanor, *id.*
in cases of riot, &c. 628.
degree of violence exercised, *id.*

MURDER—(*continued.*)
proof of malice—officers—
breaking doors, &c. 629, 630.
where the officer is killed, mode in which the killing has been effected, 631.
degree of violence used in resisting officers acting under illegal process, &c. *id.*
Scotch law on the subject, 632.
how far the acts of third persons in larceny shall affect the prisoner, 633.
private persons killed, or killing others, in apprehending offenders, 534.
where the offender has been indicted, *id.*
in case of affrays, *id.*
in case of misdemeanors, 635.
in apprehending poachers, *id.*
accusing of, 771.
killing in defence of person or property, 637.
degree of force which may be used, 638.
nature of the attempted offence which will justify homicide, *id.*
must be felony, 639.
or apprehended felony, *id.*
what violence an assault will justify, *id.*
assault with intent to chastise, 641.
necessity for the force used must appear, 642.
cases of trespass, 643.
cases of watchmen set to watch property, *id.*
whether a lodger may interfere to protect the house, 644.
proof in cases of *felo de se*, 646.
oath binding party to commit, 667.

MURDER—ATTEMPT TO COMMIT.
offence at common law, 648.
offence by statute, 649.
attempt to poison, *id.*
attempt to drown, 650.

MUTE,
standing mute, 174.

MUTUAL COMBAT,
killing by, when manslaughter, 558.
when murder, 605.

NAME,
forgery by party having same name, 383.
in fictitious name, 385.
assumed and borne by the party forging, 387.
mistake in signing of, to forged instrument, 394.
in cases of child-murder, 566.

NAVY. See *Soldiers and Sailors.*
forgeries relating to, 438.
NECESSITY,
whether nuisance justifiable from, 455.
NEGATIVE AVERMENTS,
general rules, 55.
where a fact is peculiarly within the knowledge of a party, 56.
NEGLIGENCE,
negligent burning, 209.
negligent driving, manslaughter, 560, 583, 584.
of medical men, 588 to 591.
NEGLIGENT ESCAPE,
proof of, 357.
NEWSPAPERS,
proof of publication of libel in, 531.
purloining, by officers of Post-office, 704.
NIGHT,
proof of, in burglary, 278.
taking and destroying game at night, 443. See *Game.*
what is "night," by statute 9 G. 4.—444.
NIGHT-WALKERS,
arrest of, 615.
Non compos mentis. See *Idiot, Insanity, Lunatic.*
NOTICE,
proof of, where both written and verbal, 4.
by peace-officers, of their character and authority, 625, 626, 656.
to gaoler in prison breach, 707.
NOTICE TO PRODUCE,
in general, 9.
same rule in criminal and civil cases, agent, 9.
where dispensed with, 10.
form of, *id.*
to whom and when, *id.*
consequences of, 11.
NUISANCE,
to public highways, 449. See *Highway.*
proof of the public nature of the nuisance, 659.
quære, where it furnishes a greater convenience to the public, *id.*
proof of the degree of annoyance, *id.*
need not be prejudicial to health, 660.
with regard to situation, *id.*
with regard to length of time, 661.
particular trades, 662.
rail-ways, steam-engines, &c. *id.*
acts tending to produce public disorder—acts of public indecency, 663.
disorderly inns, *id.*
gaming-houses, *id.*

NUISANCE—(*continued.*)
bawdy-houses, 664.
play-houses, *id.*
gunpowder, fireworks, &c., 665.
dangerous animals, *id.*
contagion, and unwholesome provisions, *id.*
eaves dropping, and common scolds, *id.*
proof of the liability of the defendant, 666.
NUL TEIL RECORD,
proof on issue of, 154.

OATH.
examination of prisoner must not be on oath, 44.
by witnesses, form of, 97.
does not exclude witness from revealing what he has sworn to conceal, 153.
of commissioners of bankrupt, proof of, 122.
administering or taking unlawful oaths, 666.
statutes, *id.*
proof of the oath, 667.
proof of aiding and assisting, 668.
proof for the prisoner, disclosure of facts, *id.*
venue, 669.
proof of authority to administer, in forgery, 672.
proof of the taking, in perjury, 675.
OBSTRUCTING OFFICERS. See *Smuggling.*
OBTAINING MONEY under FALSE PRETENCES. See *False Pretences, Cheating.*
OCCUPATION,
what amounts to in arson, at common law, 200.
what sufficient occupation in burglary, 264 to 278. See *Burglary.*
OFFENSIVE WEAPON,
what is, 446, 759.
OFFICE,
bribery of persons in, 244.
cheating by persons in, 291.
offences relating to officers, 669.
misfeasances by officers, illegal acts in general, *id.*
by magistrates, 670.
by gaolers, *id.*
frauds by public officers, *id.*
nonfeasances by public officers, *id.*
not performing duties, *id.*
overseer not relieving pauper, *id.*
head officer of corporation absenting himself, *id.*
extortion, 671.
refusing to execute office, *id.*

Office Copies, 155.
Opinion
of witnesses, examination as to, 137.
whether subject of perjury, 677.
Order
for payment of money, forgery of, 396.
stat. 1 W. 4. c. 66.—413, 415.
what amounts to, 415, 416, 417.
forging indorsement on, not within the statute, 414.
for delivery of goods, forgery of, 418, 420.
stealing of, 505.
Outhouse,
subject of arson at common law, 199.
what is, within the statute against arson, 204, 205.
what form part of the dwelling-house in burglary, 262, 277.
what is, in house-breaking, 332.
demolishing, 729.
Overseer,
when indictable for not relieving pauper, 670.
frauds by, in keeping accounts, *id.*
refusal to execute office of, 671.
Overt Act,
proof of, not laid in indictment in treason, 57.
Ownership,
proof of, in false pretences, 370.
in larceny, 512, *et seq.* See *Larceny.*
Oysters,
stealing, 372.
dragging oyster bed, 373.

Paper
for forging bank-notes, 429.
or bankers' notes, 431.
Pardon,
where it restores competency of infamous witnesses, 102.
promised by statute, whether it renders a witness incompetent, 105.
effect of promise of, to accomplice giving evidence, 119.
Parish
boundaries, hearsay, evidence of, 22.
proof of, in indictments, 85.
competency of inhabitants of, 111.
may be liable to repair a bridge, 247.
evidence in defence by, 251.
liability of, to repairs of highways, 456, *et seq.* See *Highways.*
proof in defence by, 461.

PARISH—(*continued.*)
goods belonging to poor of, how described in larceny, 520.
registers, 160, 381.
PARLIAMENT,
members of, bribery of, 244.
privileged publication by, 539.
petition to, no libel, *id.*
what passes in, not to be disclosed, 149.
proof of acts of, 153.
proof of journals of, 154.
PAROL,
written instruments not provable by, 2.
proof by, of appointment of persons acting in public capacity, 7.
dying declarations where reduced into writing, 27.
examination of prisoner where reduced into writing, 45.
not admissible to vary depositions, 51.
parol evidence of illegal oath in writing, 667, 668.
PARTICULARS
of the charges in barratry, 226.
PARTNERS,
occupation of, in burglary, 277.
When guilty of larceny with respect to partnership goods, 514.
property of, how laid, *id.*
PAUPERS,
marriage of, conspiracy to procure, 315, 316.
overseer when indictable for not relieving, 670.
PEACE-OFFICER,
proof of appointment of, 14, 15.
assaults by, in the execution of their duty when justifiable, 215.
assaults on, 217.
proof of escape suffered by, 356.
cases of manslaughter in resisting, 559.
killed and killing others in the performance of their duty, when it amounts to murder, 611, *et seq.* See *Murder.*
their authority, 612.
regularity of process, 621.
notice of their authority, 625.
mode of executing their duty, 627.
refusal to execute the office of, indictable, 671.
PEER,
punishable for disobeying subpœna, 91.
PEDIGREE,
hearsay when admissible on questions of, 22.
PENAL STATUTES,
compounding informations on, 311.

PENALTIES,
party entitled to, when competent witness, 109.
questions subjecting witness to, 129.
whether they may be put, 130.
consequences of answering or not answering, 132.
PERJURY,
prosecutor when a competent witness, 106.
proof of affidavit in, 157.
proof of answer in chancery in, 158.
perjury at common law, 672.
proof of authority to administer oath, *id.*
that party acted in character sufficient, 573.
commission of bankrupts, *id.*
commission for taking affidavits, *id.*
court having no jurisdiction, *id.*
persons in private capacity, *id.*
variance in statement of authority, 674.
proof of the occasion of administering the oath, *id.*
need not be in court, *id.*
before commissioners, *id.*
oath of simony, 675.
not oath before surrogate, *id.*
oath in party's own cause, *id.*
not on false verdict, *id.*
object of oath need not be effected, *id.*
proof of taking the oath, *id.*
variance in statement of, *id.*
upon answer in chancery, *id.*
upon affidavits, *id.*
identity of the party, 676.
Quakers and Moravians, *id.*
proof of the substance of the oath, *id.*
whether the whole of defendant's evidence must be proved, *id.*
oath as to belief, 677.
equivocating oath, *id.*
matter of opinion, *id.*
upon question which witness was not bound to answer, *id.*
intervening statements not varying sense, 678.
" substance and effect" construction of, *id.*
adding word, 679.
omitting letter, *id.*
proof of parol evidence of defendant, *id.*
explanatory proof by defendant, 680.
proof of materiality of matter sworn, *id.*
cases, *id.* 681, 682.
matter of circumstance, 681.

PERJURY—(*continued.*)
proof of degree of materiality, 681, 682.
proof of proceedings in equity, 682, 883.
proof of introductory averments, *id.*
matters of description, *id.*
immaterial variances, 684.
proof of trial having been had, 685.
proof of the falsity of the matter sworn, *id.*
proof of the corrupt intention of the defendant, *id.*
witness, number requisite, 686.
where the defendant's own admission is given in evidence, *id.*
competency of, 688.
statutes relating to perjury, 689.
28 Eliz. c. 5. *id.*
construction of, 690.
other statutes, *id.*
23 G. 2. c. 11., *id.*
subornation of, 601. See *Subornation.*
PERSON,
stealing from the person, 486.
proof of taking from, in robbery, 736.
PERSONATION. See *False Personation.*
PETIT TREASON,
punishable as murder, 563.
PETITIONING CREDITOR'S DEBT,
proof of, 221.
PHYSICIAN,
opinion of, admissible, 137.
not privileged as a witness, 144.
liable for *mala praxis*, 588 to 591.
proof of his practising as such, 528.
PIGEONS,
stealing of, 510.
statute 7 & 8 G. 4. c. 25., 511.
PIRACY,
offence at common law, 692.
statute 11 & 12 W. 3. c. 7., 693.
statute 8 G. 1. c. 24., *id.*
statute 18 G. 2. c. 30., 694.
statute 32 G. 2. c. 25., *id.*
proof of the piracy, 695.
proof with regard to the persons guilty of piracy, *id.*
proof with regard to accessories, 696.
PLACE,
variance in averments as to, 85.
PLANTS,
in gardens, malicious injuries to, 551.

PLATE,
transposing stamp on, 437.
PLAY-HOUSE,
indictable as a nuisance, 664.
PLEA,
imparlance and traverse, 175.
PLEDGING;
by banker, agent, or factor, 351, 352.
POACHING. See *Game.*
night poaching, 443.
with arms, 445.
power to arrest poachers, 635.
POISON,
administering to procure abortion, 191. See *Abortion.*
administering to horses, 288.
evidence in murder by means of, 572.
principal and accessories in, *id.*
attempt to, stat. 9 Geo. 4. c. 31.—649.
evidence of former attempts, 654.
taken by woman to procure miscarriage, and causing death, *felo de se*, 647.
POLICY,
proof of, 2.
on indictment for arson, 206, 207.
POLL BOOK,
copy of, admissible, 160.
POSSESSION
of stolen property, presumption of stealing, 16.
length of time after the larceny, 17.
found in a house, *id.*
after prisoner's apprehension, *id.*
proof of commission of other offence, *id.*
where property is carried into another county, 18.
evidence to be received with great caution, *id.*
of forged notes, evidence of guilty knowledge, 69.
defence of, a justification in assault, 214.
having counterfeit coin in possession, 304.
interpretation clause as to, 311.
having counterfeit foreign coin in possession, 307.
of property, so as to make it larceny, and not embezzlement in servant taking it, 344.
interpretation clause in forgery act as to, 411.
by prisoner, necessary in larceny, 471.
defence of, 637, 638.
POST OFFICE
marks, effect of in evidence, 538.
embezzlement by officers of, 697.
statute 52 Geo. 3. c. 143. s. 1. *id.*

Post Office—(*continued.*)
proof that the prisoner was a person employed by the post office, 698.
proof of the secreting, embezzlement, or destruction, 699.
proof of the letter or packet intrusted to the prisoner, *id.*
proof that the letter, &c. contained the whole or some part of a bank note, &c., 700.
accessories, &c., 701.
statute 5 G. 3. c. 25. s. 19.—701.
persons in post office applying money in letters to their own use, or burning letters, *id.*
statute 7 G. 3. c. 50. s. 3.—*id.*
stealing letters, by persons not employed in the post office, 7 G. 3. c. 50. s. 2.—702.
venue, *id.*
stealing from carriage, or possession of person employed to carry letters, or from post office, &c., 702.
what is a post office, 703.
stealing letters, &c. accidentally found, stat. 42 G. 3. c. 81. s. 4.—704.
embezzling newspapers, votes of parliament, &c. *id.*
forging post office marks, *id.*
forging franks, 705.
Postea,
proof of trial had, 157, 685.
Power of Attorney,
forgery of, 385.
for receipt of prize-money, 392, 413.
to transfer government stock, 413, 425.
forging attestation to, 427.
embezzlement of by officers of post office, 698.
Practice;
arraignment, 174.
plea, imparlance, and traverse, 175.
quashing indictment, 177.
discharge of jury, *id.*
former conviction, 178.
trial, 179.
verdict, *id.*
judgment, *id.*
costs, expenses, and rewards, 180.
Presumption,
of person acting in a public capacity being duly authorised, 7.
of document being destroyed, 12.
general nature of presumptive evidence, 12.
distinction taken in criminal and civil cases, 13.

PRESUMPTION—(*continued.*)
general instances of presumption, 14.
of innocence and legality, *id.*
of guilt arising from the conduct of the party charged, at or after the charge, 15.
from the possession of stolen property, &c., 16.
of malice, &c., 18.
of intent to defraud, 19.
of the duration of life, *id.*
of duly exercising an office, 56.
of check being forged, 387.
of way being a highway, 451.
PRETENCES. See *False Pretences.*
PRIMARY EVIDENCE;
general rule, 1.
written instruments, 2.
handwriting, 5.
negative evidence of consent, 6.
exceptions, 7.
evidence of person acting in public capacity, *id.*
admissions by party, 8.
PRINCIPAL; See *Accessories.*
confession of principal not evidence against accessory, 40.
principal admitted as witness against accessory, 118.
proofs with regard to accessories in general, 166, *et seq.* See *Accessories.*
principal in the second degree, what constitutes, 166.
principal varying from orders given to him, 168.
principals, who, in burglary, 259, 261.
in false personation, 361.
in false pretences, 371.
in forgery, 408.
at common law all are principals, 409.
in murder, by poison, 572.
in malicious injuries to the person, 657.
in the second degree, in *felo de se*, 647.
in administering unlawful oaths, 668.
in piracy, 696.
in offences relating to the post office, 701.
in rape, 708, 710.
proof of conviction of, as against receiver, 715.
party charged both as principal and receiver, 721.
PRINTED DOCUMENTS,
how proved, 4.
PRISON BREACH,
nature of the offence for which the party was imprisoned, 705.
proof of the imprisonment, and nature of the prison, 706.
proof of the breaking of the prison, 707.

PRISON BREACH—(*continued.*)
conveying tools, &c. to prisoners, to assist in escape, 707.
special enactments, 708.
PRISONER,
examination of, 43. See *Examination.*
must be present at depositions, 51.
quære before coroner, 54.
evidence of character when admissible, 72.
accomplice admissible witness for, 118.
arraignment of, 174.
plea, imparlance, and traverse, 175.
proofs for, in bigamy, 242.
death of, by ill-treatment in gaol, murder, 593.
gaoler indictable for misusing, 670.
conveying tools to, to assist escape, 707.
breach of prison by, 705. See *Prison Breach.*
rescue of, 723. See *Rescue.*
aiding to escape, 724.
PRIVATE PERSONS,
when and how liable to repair highways, 450.
defence by, 462.
libels upon, 526.
apprehending offenders, and killed, when murder or manslaughter, 560, 612.
arrest of night-walkers by, 615.
authority of, to arrest offenders in general, 634, 635.
authority to suppress an affray, 634.
PRIVILEGED COMMUNICATIONS, 144 to 153. See *Witness.*
PRIVILEGED PUBLICATIONS,
when a defence on indictment for libel, 539.
PRIZE FIGHTS,
death ensuing in course of, 587.
PROBATE,
proof of, 159.
not conclusive proof of validity of will, 413.
PROCESS,
breaking open doors to execute civil process, 628, 629.
PROCLAMATION,
under riot act, 728.
PRODUCTION OF PAPERS,
when witness privileged from, 147.
of check referred to in letter, in conspiracy, 326.
PROMISES,
effect of, in confessions, 29.
what amounts to, 30.
removal of effect of, 31.
must have reference to temporal advantage, 35.
PROMISSORY NOTE; See *Bill of Exchange.*
forgery of, 413, 414, 415.

PROMISSORY NOTE—(*continued.*)
stealing of, 505.
paid re-issuable bankers' notes may be described as promissory notes, 506.
whether as valuable securities, *id.*
PROPERTY,
defence of, 637.
PROSECUTOR,
when affected by declarations of his agents, 41.
evidence of character of, when admissible, 72.
variance in statement of name of, 79.
when a competent witness, 105.
PROVOCATION,
intent to provoke a challenge, 289.
what sufficient to make killing manslaughter, 557, 594.
words or gestures only, 595.
assault, 596.
instrument used, 598.
must be recent, 601.
express malice prevents provocation being an excuse, 604.
cases of peace-officers executing illegal process, 631.
PUBLIC BOOKS,
proof of, 159.
PUBLIC COMPANIES. See *Companies.*
PUBLIC FUNDS. See *Funds.*
PUBLIC SERVICE,
embezzlement by persons in, 348.
PUBLICATION
of libel, 529, *et seq.*
PURPORT,
effect of the word, 406.
PUTTING IN FEAR,
stealing from dwelling-house, some person being put in fear, 335.
in robbery, 740.
PUTTING OFF,
in coining, what amounts to, 300.
in forgery, 398.

QUAKERS,
evidence of, admissible, 99.
proof of marriage of, 230.
false affirmation punishable as perjury, 676.
QUARANTINE,
forging certificate of, 439.
QUASHING
of indictments, 177.

RABBITS,
taking or killing in a warren, 442.
RAILWAY,
a public highway, 450.
when a public nuisance, 662.
RANSOM,
of neutral vessel, 694.
RAPE,
declarations of woman admissible, 21.
wife competent witness against her husband, 115.
statutes respecting, 708.
proof with regard to the person committing the offence, *id.*
proof with regard to the person upon whom the offence is committed, 709.
proof of the offence, *id.*
accessories, 710.
competency and credibility of the witnesses, *id.*
unlawful carnal knowledge of female children, 711.
assault with intent to commit, 712.
RATIONE TENURÆ,
inhabitants of a district cannot be so charged, 248.
proof of such liability, 250.
private individuals so charged, 450.
RECEIPT,
proof of receipt of money, 3.
forgery of, 421.
what amounts to a receipt, 422, 424.
to assignment of navy bill, *id.*
scrip receipt, 423.
RECEIVING,
common law offence, former statutes, 712.
statute 7 & 8 Geo. 4. c. 29. *id.*
proof of the larceny by the principal, 714.
name of, need not appear, *id.*
where he is unknown, *id.*
where indictment alleges a receipt from a person named, *id.*
previous conviction of principal evidence, 715.
where he pleaded guilty, *id.*
distinction between receiving and stealing, 716.
proof of receiving, joint receipt, 718.
receipt by wife, *id.*
proof of the particular goods received, 719.
need not be in same shape as when stolen, *id.*
proof of guilty knowledge, 720.
immaterial with what intent party received the goods, 721.
proof where the prisoner is charged as principal and receiver in different counts, *id.*

RECEIVING—(*continued.*)
proof, by prisoner of innocence of principal, 722.
witnesses, competency of principal, *id.*
venue, *id.*
RECEIVER,
confession of principal felon not evidence against, 40.
proof of guilty knowledge of, 70, 720.
charged as both principal and receiver, 721.
competency of, 722.
RECEIVING-HOUSE
not a post-office, 699.
RECITAL,
in private act, effect of, 154.
RECOGNIZANCE
of witnesses, 87.
of bail, false acknowledgment of, 359.
RECORDS,
primary evidence of the facts recorded, 2.
mode of proving, 154.
nul tiel record, evidence on, *id.*
forgery of, at common law, 381.
larceny of, 503.
RECOVERY,
false acknowledgment of, 359.
RECTOR,
altering registers, when criminally liable, 433.
RE-EXAMINATION, 128.
REGISTERS,
public, copy of, admissible, 160.
forgery of, at common law, 381.
by statute, 432.
RE-GRATING, 373.
RELEASE
to and by witnesses, 112.
RELIGIOUS BELIEF
of witness, mode of inquiring into, 98.
REMUNERATION
of witnesses, 91.
REPAIRS,
indictment for not repairing bridges, 245. See *Bridges.*
not repairing highways, 455, *et seq.* See *Highways.*
REPUTATION. See *Hearsay.*
RESCUE,
nature of the offence, 723.
proof of the custody of the party rescued, *id.*
proof of the rescue, 724.
punishment, *id.*
aiding prisoner to escape, *id.*
offence under various statutes, *id.*
conveying disguise or tools to prisoners, *id.*

RES GESTÆ,
hearsay admissible as part of, 20.
RESOLUTION
of public meeting, how proved, 5.
RESTITUTION
of property obtained by false pretences, 371
award of, in forcible entry, 379.
RESURRECTION-MEN. See *Dead Bodies.*
RETAKING,
after escape, proof of, 357, 358.
REVENUE LAWS. See *Smuggling.*
REVOLT,
endeavouring to make, in ship, 693.
REWARDS,
when they render a witness incompetent, 104, 108. See *Informers.*
to persons apprehending prisoners, 183.
for helping to stolen goods, 312
RICK. See *Arson, Stack.*
RING-DROPPING.
See *Addenda.*
RIOT,
hearsay when admissible on prosecution for, 22.
conspiracy to create, 315.
killing rioters in suppressing riot, 635.
nature of, in general, 726.
proof of the unlawful assembling, *id.*
proof of the violence or terror, *id.*
proof of the object, private grievance, 727.
proof of the guilt of the defendants, *id.*
prosecutions under the riot act, 728.
proof of demolishing buildings, &c. 729.
what is a beginning to demolish, *id.*
RIVER,
presumption of public navigable river, 14,
a public highway, 450.
obstruction of, a public nuisance, 454.
maliciously breaking down banks of, 548.
ROAD. See *Highway.*
ROBBERY,
statute 7 & 8 Geo. 4. c. 29.—733.
proof of the goods taken, *id.*
must be in peaceable possession of prosecutor, 734.
proof of the taking, 734.
felonious intent, 735.
bonâ fide claim, *id.*
robbery not original intent, *id.*
where several are concerned, *id.*
after quarrel, 736.
from the person. *id.*

ROBBERY—(*continued.*)
in presence of the owner, 737.
against the will of the owner, *id.*
proof of the violence, or putting in fear, 738.
degree of violence, *id.*
under pretence of legal or rightful proceedings, 739.
proof of putting in fear, 740.
mode of putting in fear, *id.*
need not be threats, 741.
colour of purchase, &c. *id.*
menaces and threats, 742.
degree of fear, *id.*
of injury to the person, 743.
of injury to property, 744.
of injury to reputation, *id.* to p. 752.
threat of imprisonment, 752.
must be before the taking, 754.
assault, with intent to rob, 754.
statute 7 & 8 G. 4. c. 29, *id.*
proof of the assault, 755.
proof of the intent to rob, *id.*
ROOKS,
stealing of, 509.
ROUT,
what constitutes, 730.
RULE OF COURT,
Office copy of, 156.

SACRILEGE,
Statute 7 and 8 Geo. 4, c. 29,—756.
proof of the building being a church or chapel, *id.*
dissenting chapel, not within the act, 757.
proof of the stealing of the goods, *id.*
what goods are within the act, *id.*
SAILORS. See *Soldiers and Sailors.*
SALVAGE,
assaulting persons engaged in, 215.
SAVINGS BANKS,
larcenies relating to, 505.
SCOLD;
common scold, a nuisance, 665.
SCOTLAND,
proof of marriage in, 233 to 236.
SEA BANKS,
maliciously breaking down, 548.
SECONDARY EVIDENCE,
when admissible in general, 9.
notice to produce, *id.* See *Notice to Produce.*
loss of documents, 11.

SECONDS
in duels, when guilty of murder, 611.
SEDITION,
unlawful oath to engage in seditious purpose, 666.
seditious libels, 525, 526.
SEISIN.
presumption of in seisin, fee, 14.
SELF-DEFENCE. See *Justifiable Homicide*..
excuse in assault, 213.
SERVANT
may justify an assault in defence of his master, 214, 638.
burglary in houses occupied by, 273, 275.
what are within the 7 & 8 Geo. 4, as to embezzlement, 339. See *Embezzlement*.
with regard to his wages or payment, 341.
goods in possession of, must be laid in master in larceny, 518.
publication of libel by, 580.
giving character of, no libel, 540.
may interpose in defence of his master's person or property, 638.
SESSIONS,
minute book of, effect of in evidence, 154, 155.
SEVERANCE
of goods from possession of owner, necessary in larceny, 471.
SEWERS ;
goods belonging to commissioners of, how described in larceny, 521.
SHEEP,
stealing of, 284.
killing with intent, &c. 286.
maiming of, *id.*
SHERIFF,
liable for an escape, suffered by his bailiff, *quære*, 356.
power to suppress riots, 726.
under riot act, 728.
SHIP,
setting fire to, 208
burning, destroying King's ships, 209.
assault upon officers endeavouring to save shipwrecked property, 217.
captain forcing men on shore abroad, 465.
larceny by, 478.
stealing from, in any port, river, canal, &c. 508.
from vessels in distress, *id.*
wrecked property found in possession, *id.*
malicious injuries relating to, 552.
destroying with intent to defraud, *id.*

SHIP—(*continued.*)
damaging otherwise than by fire, 552.
exhibiting false lights to bring ships into danger, 553.
cutting away buoys, &c. *id.*
receiving anchors, &c. weighed up, *id.*
piracy by master or marines, 693, 694.
SHOOTING,
with intent to murder, stat. 9 G. 4. c. 31—649, 650.
with intent to do some grievous bodily harm, &c. 655.
SHOP,
demolishing of, 729.
breaking and entering and stealing in, 757.
SIGNATURE
of prisoner to examination, 47.
by witness making deposition, 52.
in indictment for stealing bank note, when necessary to be proved, 78.
want of, to promissory note, prevents the case being forgery, 415.
SLAVES,
conveying of, &c. piracy, 694.
SMUGGLING,
assault upon officers, endeavouring to prevent, 217.
statute 3 & 4 W. 4. c. 53.—158.
proof of assembling armed to assist in, 759.
proof of being assembled together, *id.*
proof of being armed with offensive weapons, *id.*
proof of shooting at a boat belonging to the navy, &c. 760.
proof of being in company with others having prohibited goods, *id.*
service of indictment in certain cases, and entering plea for prisoner, 761.
certain rules of evidence, *id.*
limitation of prosecutions, 762.
venue, 763.
SODOMY. See *Unnatural Practices.*
statute 9 G. 4, c. 30.—763.
proof of the offence, 764.
SOLDIERS AND SAILORS. See *Greenwich Hospital.*
false personation of, 360.
forgeries relating to, 438.
SOUTH SEA COMPANY ;
embezzlement by officers of, 350.
SPORT ;
death ensuing in course of, when manslaughter, 581, 585.
SPRING GUNS ;
statute 7 & 8 G. 4. c. 18.—764.

STABBING,
on indictment for (1 Jac. 1) prisoner might be convicted of manslaughter, 75.
proof of, under stat. 9 G. 4. c. 31.—651.
nature of the instrument, 651, 652.
STACKS,
setting fire to, 207,
STAGE COACH,
goods stolen from on journey. See *Journey.*
STAMPS,
when necessary in criminal proceedings, 164.
venue in indictments for offences relating to, 189.
on policy of insurance, produced in arson, 207.
forgery of unstamped instruments, 392.
counterfeit, vending of, 394, 395.
forgery of, in general, 434.
stat. 52 G. 3. *id.*
55 G. 3. 435.
3 & 4 W. 4. c. 97, vending and having counterfeit stamps in possession, 435, 436.
proof of transposing stamp, 437.
variance, *id.*
STATE,
matters of, privileged from disclosure, 149.
STATUTE,
proof of, 153.
private act, 154.
effect of recital in, *id.*
roads made by authority of, 457.
inclosure under, does not render party liable to repair, 458.
STEALING. See *Larceny.*
in dwelling-house above the value of 5*l.* 332.
any person being put in fear, 335.
in a building within the curtilage, 336.
in a shop, 757.
from the person, 486.
from vessels in port, &c., 508.
distinction between stealing and receiving, 716.
in a church, 756.
STEAM-ENGINE,
used in mine, maliciously damaging, 547.
regulations respecting, when nuisances, 662.
STOCK. See *Funds.*
STORES,
naval or military, embezzling, 354.
STRANGLE,
attempt to, 649.

STRAW,
setting fire to stack of, 207.
construction of the word, *id.*
STREET,
nuisances in, 453, 454. See *Highways.*
SUBJECTION
to power of others. See *Coercion.*
SUBPŒNA
to compel the attendance of witnesses, 88.
whence issued, *id.*
duces tecum, effect of, *id.*
how served, *id.*
where witness is in different part of the United Kingdom, *id.*
for prisoner, 89.
consequences of neglect to obey, 90.
SUBORNATION OF PERJURY,
proof of the incitement, 691.
proof of the taking of the false oath, *id.*
SUFFOCATE,
attempt to, 649.
SUNDAY,
process cannot be served on, 629.
SURGEON,
liable for *mala praxis*, 588, 591.
SURPLUSAGE,
what descriptive averments may be rejected as, 77.
in stating addition to name of prosecutor, 81.
in use of words not used by statute, 397.
means of wounding on indictment for malicious injury, 653.
SURROGATE,
proof of acting as, 673.
false oath before, not perjury, 675.
SUSPICION
of felony, arresting on, 612, *et seq.*
justification of violence in defence of dwelling-house, 639, 643.
SWANS,
stealing of, 509.
SWINDLING. See *Cheating, False Pretences.*

TACKLE. See *Machinery.*
TAKING,
in larceny, 469, *et seq.* See *Larceny.*
in piracy, 695.
in robbery, 734.
TALLY,
larceny of, 505.

TENANTS IN COMMON.
no larceny by, 514.
property of, how laid, *id.*
TENOR,
effect of the word, 405, 684.
TERMINI
of highways, proof of, 452.
TERRIER
ancient, proof of, 160.
THOROUGHFARE;
whether it can be a highway, 452.
THREATS,
under confession inadmissible, 29.
impression of, removed, 31.
must proceed from person having power, 33.
what amounts to a threat, 34.
must have reference to temporal object, 35.
evidence of other threats by prisoner, 71.
evidence of hand writing to threatening letter, 164.
compelling a person by, to kill himself, murder, 571.
of accusing person of unnatural practices, when sufficient to make such a putting in fear to constitute robbery, 744 to 752.
demanding money with menaces, 765.
statute 7 & 8 Geo. 4. c. 29, *id.*
proof of the demand, *id.*
proof of the threat or force, 766.
proof of the intent, *id.*
proof of the thing demanded, 767.
proof of the sending or delivering of the letter, 768.
proof of the nature of the letter or writing, the demand, 770.
accusing of murder, &c. 771.
statute 4 G. 4. c. 54. *id.*
proof of the sending of the letter, 772.
proof of the letter, threatening to kill or murder, *id.*
accusing of infamous crime, 772.
statute 7 & 8 G. 4. c. 29. *id.*
proof of the accusing, 774.
proof of the nature of the accusation, *id.*
proof of the view or intent, 775.
proof of the thing intended to be extorted, *id.*
THRESHING MACHINES,
malicious injuries to, 555.
TIME,
variance in averments as to, 84.
TOLLS;
effect of, with regard to repairs of bridges, 248.
maliciously destroying toll-house, 549.

TOOLS,
coining tools, offences relating to, 308.
conveying to prisoner, to assist escape, 707.
TOWING PATH,
a public highway, 450.
TOWNSHIP
may be liable to repair a bridge, 247.
evidence in defence by, 251.
may be liable to repair a highway, 459.
former convictions against, when evidence of liability, 462.
TRADE,
conspiracies affecting, 316.
to injure an individual in his trade, 320.
forgeries affecting, 439.
what trades are a nuisance, 659, 662.
with pirates, 694.
TRADING,
proof of, 221.
TRANSPORTATION,
returning from, 775.
TRAP-DOOR,
opening of a, breaking in, burglary, 254.
TRAVERSE
in general, 175.
in coining, 310.
TREASON,
hearsay, when admissible, 21.
depositions under statute, not admissible in, 50.
proof of overt act, not laid in indictment, 57.
acts and declarations of traitors, when admissible, 60.
collateral declarations of prisoner when admissible, 71.
whether wife a competent witness, 115.
TREES,
malicious injuries to, 549.
above the value of 1*l.* in parks, &c. *id.*
above the value of 1*s.* elsewhere, 550.
plants, &c. in gardens, 551.
TRESPASS;
conspiracy to commit, not indictable, 320.
goods taken by, not larceny, 472.
what degree of violence is justifiable in resisting a trespasser, 643.
TRIAL;
at assizes of, indictment found at sessions, 179.
partial, change of venue on account of, 189.
postponement of, to instruct infant witness, 95.
but not an adult, *id.*
plea of not guilty, puts party on, 175.
refusal to plead at, 174.

TURNPIKES,
goods belonging to trustees of, how described in larceny, 520.
maliciously throwing down gates, &c. 549.

UNDERWOOD;
maliciously destroying, 549.
UNDERWRITERS
destroying ships, with intent to defraud, 552.
UNKNOWN;
statement of stealing goods of a person unknown, 80, 518.
murder of child whose name is unknown, 566.
statement of receiving goods from person unknown, 714.
UNLAWFUL ASSEMBLY,
what constitutes, 731.
UNNATURAL PRACTICES,
threat to accuse of, a sufficient putting in fear in robbery, 744.
UTTERING
counterfeit coin, 300.
simple uttering, 301.
compound offence, *id.*
what makes a joint uttering, 302.
forged instruments, 397.
disposing, or putting off, 398.
what constitutes principals in, 408.

VALUABLE SECURITY,
what comprised under the term, 505.
paid reissuable bankers' notes, whether, 506.
incomplete bill not a valuable security, 507.
VALUE,
proof of in indictments in general, 86.
in prosecution against bankrupt for concealing his effects, 225.
proof of value of goods in stealing in dwelling-house above 5*l.*, 333.
of the thing stolen in larceny, 512.
in robbery, 734.
VARIANCE; See *Issue.*
in divisible averments, 74, *et seq.*
in descriptive averments, 79, *et seq.*
in averments as to time, 84.
as to place, 85.
as to value, 86.
in arson, 202.
in statement of intent in burglary, 281.
in proof of putting off counterfeit coin, 303, 304.
in statement of ownership of dwelling-house, 334.

VARIANCE—(*continued.*)
in statement of forging, 397.
of forged instrument, 405, 406.
in transposing stamp, 437.
in indictment for night poaching, 444.
in statement of highway, 452, 453.
in statement of mode of killing in murder, 577.
in statement of authority to administer oath, 674.
in statement of substance of matter sworn, 678.
in introductory averments in perjury, 683.
VEGETABLES,
in gardens, malicious injuries to, 551.
VENUE,
in case of trial of accessories before the fact, 171.
after the fact, 172.
offences committed on boundaries of counties, or partly in one county, 185.
offences committed on persons or property in coaches employed on journies, or vessels on inland navigation, *id.*
offences committed in the county of a city, or town corporate, 186.
offences committed in Wales, 187.
offences committed at sea, or within the admiralty jurisdiction, 187.
offences against excise, customs, stamps, &c., 189.
want of proper venue when cured, *id.*
change of, *id.*
in abduction, 196.
in bigamy, 242.
in not repairing bridges, 251.
in challenging to fight, 289.
in coining, 310.
in conspiracy, 327.
in escape, 355.
in forgery, 409.
in larceny, 521.
in libel, 537.
in murder, abroad, and at sea, 563.
in administering unlawful oaths, 669.
in perjury, 676.
in piracy, 693, 694, 696.
in receiving stolen goods, 722.
in prosecutions respecting smuggling, 763.
VERDICT,
not sufficient to prove witness infamous, 101.
proof of, 156.
VESSEL. See *Ship.*

VIOLENCE,
proof of, in case of forcible entry, 376.
proof of, in case of riot, 726.
proof of, in robbery, 738.
VOIRE DIRE,
examination on, 125.
VOLUNTARY ESCAPE,
proof of, 357.
VOTES
of parliament, stealing by officers of post office, 704.

WAGER,
does not render a witness incompetent, 105.
WAGES,
assault in pursuance of conspiracy to raise wages, 217.
conspiracies to raise, 317.
WALES,
venue in case of offences committed in, 187.
WALLS,
breaking of, in burglary, 257.
WAREHOUSE,
demolishing of, 729.
breaking, and stealing in, 757.
WAREHOUSED GOODS,
embezzling, 354.
WAREHOUSEMAN,
larceny by, 480.
WARRANT
for payment of money, forgery of, 413, *et seq.*
stealing of, 505.
when peace officer or private person may arrest without warrant, 613, 614, 615.
proof of, 620.
regularity of, *id.*
blank warrants, 621.
whether necessary before breaking open outer door to suppress an affray, 629.
of attorney. See *Power of Attorney.*
WARRANTY,
when it amounts to a false pretence, 365.
WARREN,
taking or killing hares, &c. in, 442.
WASHERWOMAN,
property may be laid in, in larceny, 515.
WEAPON;
use of deadly weapon in cases of mutual combat, 606, *et seq.*
in other cases, 643.

WEAPON—(*continued.*)
against trespassers, 643.
offensive, what shall be deemed, 446.
WEIGHTS AND MEASURES,
false, cheating by, 291, 293.
WIFE; See *Husband and Wife.*
competency of, as a witness, 112, *et seq.* See *Witness.*
not guilty of arson by setting fire to her husband's house, 206.
justification by, in assault, defence of her husband, 213.
when competent witness in bigamy, 229.
occupation by, occupation of her husband, in burglary, 270.
cannot be convicted of stealing in a dwelling-house, in the house of her husband, 334.
may be convicted of forcible entry on husband's premises, 379.
taking goods of her husband, not larceny, 476.
goods stolen from, must be laid as husband's property, 517.
indictable for keeping a gaming-house, 663.
or bawdy-house, 664.
witness against husband, in rape, 708.
carnal knowledge of, by a man pretending to be the husband, whether a rape, 709.
liability of, on indictment for receiving, 718, 719.
coercion of, by husband, 785.
WILL,
proof of, not by parol, 2.
forgery of, at common law, 382.
though party be alive, 391.
of land, with two witnesses only, 397.
in general, 412.
probate not conclusive proof of validity, 413.
destroying or concealing, 504.
WINDOWS,
breaking of, in burglary, 255.
entry through, in burglary, 259, 260.
when peace-officers justified in breaking through, 629, 630
WITNESS,
depositions, evidence to contradict, 52.
mode of compelling the attendance of, 87.
by recognizance, *id.*
by subpœna, 89.
by *habeas corpus ad testificandum*, 89.
neglect to obey subpœna, 90.
remuneration of, 91.
whether witness is bound to answer without tender of expenses, 92.
protection of, 93.
incompetency of, from want of understanding, 94.
infants, *id.*
instruction of, 95.

WITNESS—(*continued.*)
deaf and dumb, 95.
idiots and lunatics, *id.*
incompetency from want of religious principle, 96.
general rule, *id.*
form of the oath, 97.
questions as to religious belief, 98.
Quakers and Moravians, 99.
persons excommunicated, *id.*
incompetency from infamy, 100.
what crimes disqualify, *id.*
in what manner the conviction must be proved, 101.
competency, how restored, 102.
by suffering the punishment, *id.*
by pardon, *id.*
by reversal of judgment, 103.
incompetency from interest, 104.
nature of the interest in general, *id.*
rewards, *id.*
wagers, 105.
prosecutor, when competent, *id.*
informers, when competent, 108.
inhabitants, when competent, 110.
bail, incompetent, 111
interest, how removed, 112
incompetency—husband and wife, *id.*
general rule, *id.*
lawful husband and wife only excluded, 113.
nature of the evidence which the husband or wife is excluded from giving, *id.*
cases where husband or wife has been held incompetent, 114.
cases of personal violence, 115.
admissibility of accomplices, 117.
accomplices in general, *id.*
principal felon, 118.
accomplice, when competent for prisoner, *id.*
promise of pardon, 119.
effect of accomplices evidence, *id.*
confirmation, 120.
situation of accomplice when called as a witness, 121.
examination of, 123.
ordering witnesses out of court, *id.*
at what time objection to competency must be taken, 124.
voire dire, 125.
examination in chief, 126.
cross-examination, 127.
re-examination, 128.

WITNESS—(*continued.*)
questions subjecting witness to a civil suit, 129.
to a forfeiture, *id.*
to penalties or punishment, *id.*
whether they may be put, 130.
consequences of answering, 132.
consequences of not answering, *id.*
objection must be taken by witness himself, 133.
whether a witness is bound to answer questions tending to degrade, *id.*
evidence of general character, 135.
when a party may contradict his own witness, 136.
examination as to opinion, 137.
credit of, how impeached and supported, 139.
impeached by irrelevant questions on cross-examination, *id.*
by relevant questions—contradiction by other witnesses, 140.
proof of former declarations in support of credit of witnesses, 142.
privileged communications, 144.
general rule, *id.*
what persons are privileged, *id.*
form of oath to witness claiming the privilege, 146.
what matters are privileged, *id.*
production of deeds, &c., 147.
disclosures by informers, *id.*
to whom, *id.*
matters of state, 149.
matters before grand jury, 150.
matters of fact, *id.*
attorney, party to transaction, 152.
where oath of office has been taken not to divulge, 153.
attesting witness, 161.
when waived, *id.*
creditor, when competent on prosecution of bankrupt, 222.
endeavouring to persuade from giving evidence, 544.
number required in perjury, 686,
credibility of, in rape, 710.
competency in particular prosecutions, in prosecution of bankrupt for concealment, 222.
in bigamy, 114, 229.
in indictment for not repairing bridge, 251.
in forcible entry, 379.
in forgery, 409.
in indictments respecting highway, 462.
in perjury, 686.

WITNESS—(*continued.*)
in rape, 710.
in receiving, 722.
WOOLLEN GOODS. See *Manufacture.*
WORDS,
not a sufficient provocation in homicide, 595.
WORKMEN,
assaults and violence by, 217, 219.
conspiracies by, to raise wages, 317.
negligence of, when amounting to manslaughter, 582.
WOUND;
construction of the word in stat. 7 & 8 G. 4. c. 30. s. 16, (wounding cattle), 287.
death caused by wounding, when it amounts to murder, 573, *et seq.*
proof of wounding under stat. 9 G. 4. c. 31.—652.
construction of the word "wound" in that statute, *id.*
instruments used immaterial, 653.
WRECK,
stealing from, 508.
WRIT,
proof of, 157.
WRITTEN INSTRUMENTS; See *Parol.*
contents of, cannot be proved by parol, 2,
what cases are not within this rule, 3.
appointments of persons acting in a public capacity, 7.
larceny of, 504.

PRINTED BY STEWART AND CO., OLD BAILEY.